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No. 96-___

In The

Supreme Court of the United States

October Term, 1996

BOARD OF EDUCATION OF THE ENLARGED CITY SCHOOL DISTRICT OF THE CITY OF WATERVLIET, NEW YORK,

Petitioner,

-against-

COLLEEN RUSSMAN, A CHILD WITH DISABILITIES, BY HER PARENTS, PATRICIA AND PAUL RUSSMAN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Individuals with Disabilities Education Act and its accompanying regulations require that a local public school district provide the services of a consultant teacher and a teaching aide to disabled students attending a non-public school on-site at the premises of the non-public school, when such students have been voluntarily enrolled there by their parents?

LIST OF PARTIES

The parties to the proceeding below are:

1. Petitioner, Board of Education of the Enlarged City School District of the City of Watervliet, New York.

2. Respondents, Colleen Russman, a child with disabilities, by her parents, Patricia and Paul Russman.

3. Defendant Thomas Sobol, as Commissioner of the New York State Education Department, was dismissed as a party-defendant to this action pursuant to an Order signed by Magistrate Judge Ralph W. Smith on May 11, 1994 and entered on May 12, 1994.

TABLE OF CONTENTS

Page

Question Presented i

List of Parties ii

Table of Contents iii

Table of Authorities v

Opinions Below 1

Jurisdiction 2

Statutory and Regulatory Provisions Involved 2

Statement of the Case 5

Reasons for Granting the Writ 10

1. The Decision Below Misunderstands Applicable Law and Regulations Governing a Public School District's Responsibility to Provide Services to Students with Disabilities Voluntarily Enrolled by their Parents at a Non-Public School 10

   (a) The rationale of the court below 11

   (b) Misunderstanding of applicable law and regulations 12

   (c) The statutory scheme 12

   (d) The regulatory scheme 14

   (e) Administrative interpretation 16

2. The Decision Below Conflicts With The Decisions of Two Other U.S. Circuit Courts of Appeals 18

Conclusion 23

TABLE OF CONTENTS – Continued

Page

Appendix A – Decision of the United States Court of Appeals for the Second Circuit 1a

Appendix B – Decision of Judge Cholakis from the United States District Court for the Northern District of New York 17a

Appendix C – Judgment of the United States District Court 30a

Appendix D – Decision of Magistrate Smith from the United States District Court for the Northern District of New York 32a

Appendix E – Decision of the New York State Education Department State Review Officer 48a

Appendix F – Order Amending Opinion from the United States Court of Appeals for the Second Circuit ... 63a

Appendix G – Denial of petition for rehearing en banc 65a

Appendix H – Mandate from the United States Court of Appeals for the Second Circuit 67a

TABLE OF AUTHORITIES

Page

CASES

Bd. of Ed. of the Monroe-Woodbury Cent. School Dist. v. Wieder, 72 NY2d 174 (1988).....7, 8

Cefalu v. East Baton Rouge Parish School Bd., 907 F.Supp 966 (M.D.La. 1995)..... 22

Fowler v. Unified School Dist. No. 259, 900 F.Supp 1540 (D.Kan 1995)..... 22

Goodall v. Stafford County School Dist., 930 F.2d 363 (4th Cir.), *cert. denied* 502 U.S. 864 (1991).. 18, 19, 20, 21

K.R. v. Anderson Community School Corp., 81 F.3d 673 (7th Cir. 1996).....20, 21

McNair v. Cardimone, 676 F.Supp 1361 (S.D. Ohio 1987), *aff'd on other grounds*, 872 F.2d 153 (6th Cir. 1989) 22

Thomas Jefferson University v. Shalala, 114 S.Ct. 2381 (1994)..... 17

Three Affilitated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C., 467 U.S. 138, 157 (1984)..... 11

Tribble v. Montgomery County Board of Educ., 798 F.Supp. 668 (M.D.Ala. 1992) 22

ADMINISTRATIVE RULINGS

OSEP Memorandum 94-17, 20 IDELR 1440 (1994)..... 16

Response to Hon. Mitch McConnell, 22 IDELR 369 (1994)..... 16

Response to Inquiry from Robert R. Davila, 16 EHLR 1398 (1990)..... 16

49 Fed. Reg. 48522 (Dec. 12, 1984) 17

TABLE OF AUTHORITIES – Continued

Page

STATUTORY AUTHORITIES

Individuals with Disabilities Education Act

20 U.S.C. §§1400 et seq 2, 5, 10

20 U.S.C. §1401(18) 13

20 U.S.C. §1412(1) 12

20 U.S.C. §1412(2)(C) 12

20 U.S.C. §1412(2)(B) 10, 13

20 U.S.C. §1413(a)(4) 3

20 U.S.C. §1413(a)(4)(A) 10, 13

20 U.S.C. §1413(a)(4)(B) 10, 13, 14

20 U.S.C. §1413(a)(4)(B)(i) 13

20 U.S.C. §1414(a) 12

20 U.S.C. §1414(a)(5) 13

N.Y. Educ. L. §3602-c 7

REGULATORY AUTHORITIES

34 C.F.R. Part 76 ..... 4, 12

34 C.F.R. §76.651(a)(1) 4, 15

34 C.F.R. §76.651(a)(2) 4, 15

34 C.F.R. §76.654(a) 4, 15

34 C.F.R. Part 300 ..... 3, 5, 10, 14

34 C.F.R. §300.341 13

34 C.F.R. §300.346 13

TABLE OF AUTHORITIES – Continued

Page

34 C.F.R. §300.400 10
34 C.F.R. §300.401 10
34 C.F.R. §300.402 10
34 C.F.R. §300.403 ..... 3, 10, 14
34 C.F.R. §300.450 10
34 C.F.R. §300.451 10
34 C.F.R. §300.451(a) 3, 14
34 C.F.R. §300.451(b) 4, 15
34 C.F.R. §300.452 ..... 4, 10

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner Board of Education of the Enlarged City School District of the City of Watervliet, New York, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceeding on June 12, 1996 and affirmed by the mandate issued September 13, 1996, after the Second Circuit denied a petition for a rehearing en banc on August 19, 1996.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (Appendix A, pp. 1a-16a, *infra*) is reported at 85 F.3d 1050, 24 IDELR 274 (1996). The opinion of the United States District Court for the Northern District of New York (Appendix B, pp. 17a-29a, *infra*) is reported at 22 IDELR 1028 (1995). The opinion of United States Magistrate Judge of the United States District Court for the Northern District of New York, (Appendix D, pp. 32a-47a, *infra*) is reported at 22 IDELR 1 (1994). The administrative decision of the New York State Review Officer (Appendix E, pp. 48a-62a, *infra*) is reported at 22 IDELR 731 (1993).

JURISDICTION

The decision of the United States Court of Appeals for the Second Circuit is dated June 12, 1996. The Order from the Second Circuit denying a petition for a rehearing en banc is dated August 19, 1996 and the mandate issued by that court in the above-entitled proceeding is dated September 13, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. The Individuals with Disabilities Education Act ("IDEA"), (20 U.S.C. §§1400 *et seq.*), provides in relevant part:

> Any State meeting the eligibility requirements set forth in Sec. 1412 of this title and desiring to participate in the program under this subchapter shall submit to the Secretary, through its State educational agency, a State plan at such time, in such manner, and containing or accompanied by such information, as the Secretary deems necessary. Each such plan shall – . . . set forth policies and procedures to assure –
>
> (A) that, to the extent consistent with the number and location of children with disabilities in the State who are enrolled in private elementary and secondary schools, provision is made for the participation of such children in the program assisted or carried out under this subchapter by providing for such children special education and related services; and

> (B) children with disabilities in private schools and facilities will be provided special education and related services (in conformance with an individualized education program as required by this subchapter) at no cost to their parents or guardian, if such children are placed in or referred to such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this subchapter or any other applicable law requiring provision of special education and related services to all children with disabilities within such State; . . . (20 U.S.C. §1413(a)(4)).

2. The Assistance to States for the Education of Children with Disabilities (IDEA) Regulations, (34 C.F.R. Part 300), provide in relevant part:

> If a child with a disability has [a] F[ree]A[appropriate]P[ublic]E[ducation] available and the parents choose to place the child in a private school or facility, the public agency is not required by this part to pay for the child's education at the private school or facility. However, the public agency shall make services available to the child as provided under Secs. 300.450-300.452 [pertaining to Children With Disabilities Enrolled by their Parents in Private Schools]. (34 C.F.R. §300.403).

Also, a state educational agency must ensure that:

> To the extent consistent with their number and location in the State, provision is made for the participation of private school children with disabilities in the program assisted or carried out under this part by providing them with special education and related services[,] (34 C.F.R. §300.451(a)); and

> The requirements of 34 C.F.R. Secs. 76.651-76.662 are met. (34 C.F.R. §300.451(b))
>
> Each L[ocal] E[ducational] A[gency] shall provide special education and related services to meet the needs of private school children with disabilities residing in the jurisdiction of the agency. (34 C.F.R. §300.452).

3. The Education Division General Administrative ("EDGAR") Regulations, (34 C.F.R. Part 76), provide in relevant part that with respect to the "Participation of Students Enrolled in Private Schools" in state-administered programs:

> A subgrantee shall provide students enrolled in private schools with a genuine opportunity for equitable participation in accordance with the requirements in Sec. 76.652-76.662 and in the authorizing statute and implementing regulations for a program. (34 C.F.R. §76.651(a)(1)).
>
> The subgrantee shall provide the opportunity to participate in a manner that is consistent with the number of eligible private school students and their needs . . . (34 C.F.R. §76.651(a)(2)).
>
> The program benefits that a subgrantee provides for students enrolled in private schools must be comparable in quality, scope, and opportunity for participation to the program benefits that the subgrantee provides for students enrolled in public schools. (34 C.F.R. §76.654(a)).

STATEMENT OF THE CASE

This case involves an issue of nationwide importance regarding the scope of a public school district's responsibility, under the Individuals with Disabilities Education Act, ("IDEA"), (20 U.S.C. §§1400 *et seq.*), and its accompanying regulations, (34 C.F.R. Part 300), to provide services to students with disabilities voluntarily enrolled by their parents in non-public schools. Colleen Russman, respondent herein, requested that petitioner, the Board of Education of the Enlarged City School District of the City of Watervliet, New York ("the District") provide her with on-site consultant teacher and teaching aide services within the premises of a parochial school. The U.S. Court of Appeals for the Second Circuit, in its decision below, determined that IDEA and its implementing regulations compelled the District to provide such services. Petitioner believes that this determination is erroneous. It misunderstands applicable law and regulations and is in direct conflict with the rulings of two other circuit courts of appeals. It is also contrary to the official position of the U.S. Secretary of Education and the U.S. Department of Education, the governmental official and entity responsible for overseeing the implementation of IDEA and its regulations, and for promulgating such regulations.

The facts in this case are as follows. Colleen is a student with mental retardation and physical disabilities who throughout this action has been a resident of the District. Prior to the 1991-1992 school year, Colleen attended and received services within the District's public schools with other disabled children. However, in May 1991, Colleen's parents asked the District's Committee on Special Education ("CSE") to consider the possibility of

integrating Colleen into a mainstream program for the 1991-1992 school year, preferably at St. Brigid's School, a private parochial school in Watervliet attended by Colleen's sisters. In response, the CSE recommended that Colleen be mainstreamed into an appropriate classroom and receive speech therapy and occupational therapy, as well as a full-time teaching aide and the services of a part-time consultant teacher. The District's board of education agreed that the CSE's proposal was appropriate, but refused to provide the services at St. Brigid's School. The board of education's refusal was based on its concern that providing such on-site services would violate the Establishment Clause of the First Amendment to the U.S. Constitution, as well as on its understanding that nothing in federal or state law required the District to provide on-site services. Colleen's parents sought administrative review of this determination. A State Review Officer subsequently annulled the CSE's recommendation based on procedural violations involved in the development of the 1991-1992 individualized education program ("IEP").

In May 1992, the District's CSE convened and developed an IEP for Colleen for the 1992-1993 school year. The 1992-1993 IEP again provided for Colleen's placement in a mainstreamed educational environment, with speech and occupational therapy and the services of a part-time consultant teacher and a full-time teaching aide. The part-time consultant teacher services consisted of one hour per day, including one-half hour of direct assistance in reading, mathematics and language arts, and the other half-hour of indirect consultation with the classroom teacher concerning test modification and classroom assignments of reading, English, spelling, penmanship, mathematics, social studies, science and health. The

consultant teacher services also included modification of the academic curriculum to make it appropriate for Colleen. On the other hand, the full-time teaching aide services consisted of direct support services to Colleen in reading, English, spelling, penmanship, mathematics, social studies, science, and health, in the classroom, to assist Colleen in understanding the material and focusing her attention to class activities, under the supervision of her teachers.

However, after considering alternative programs, the legal issues involved, and Colleen's experiences during the 1991-1992 school year, the CSE denied her parents' request that the IEP for 1992-1993 be implemented at St. Brigid's School. The District's board of education agreed with the CSE decision in all respects and Colleen's parents sought administrative review of this determination. An impartial hearing officer upheld the District's decision and a State Review Officer upheld the decision of the impartial hearing officer who had ruled in favor of the District.

Colleen, by her parents, then commenced this action in U.S. District Court alleging the denial of services at St. Brigid's violated the Individuals with Disabilities Education Act §1413, New York Education Law §3602-c[1], and

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[1] New York Education Law §3602-c, also known as the state's dual-enrollment law, pertains to the provision of publicly-funded special education, gifted, occupational and vocational services to students attending non-public schools within the state of New York. As interpreted by the New York State Court of Appeals in *Bd. of Ed. of the Monroe-Woodbury Cent. School Dist. v. Wieder*, 72 NY2d 174 (1988), the statute permits public school districts to determine where dual-enrollment

the Free Exercise Clause of the First Amendment to the U.S. Constitution. In response, the District argued that the provision of services on-site at the parochial school is not mandated by either federal or state law and that requiring these services would be a violation of the Establishment Clause of the First Amendment to the U.S. Constitution. The parties cross-moved for summary judgment, and by Memorandum-Decision and Order, a U.S. Magistrate Judge granted summary judgment to the District, holding that the services sought by Colleen and her parents were not mandated by state or federal law, and, further, that the provision of said services would violate the Establishment Clause. (pp. 32a-47a, *infra*).

Colleen and her parents then appealed that decision to a U.S. District Judge, who reversed the Order of the Magistrate Judge, and in a Memorandum Decision ruled that IDEA and its accompanying regulations required the District to provide the requested services on-site at the parochial school Colleen's parents wish for her to attend. The District Judge further found no constitutional objection to providing such services at the parochial school. (pp. 17a-29a, *infra*). Thereafter, the District appealed to the U.S. Court of Appeals for the Second Circuit, which affirmed the Order of the District Judge.

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services are to be provided. It does not require school districts to provide on-site dual-enrollment services on the premises of a non-public school. The issue of "[w]hether a school board might, as a matter of choice, offer certain services . . . without running afoul of the Establishment Clause," however, was not a question presented before the New York Court of Appeals in the *Wieder* case. (72 NY2d at 189).

Relying on this Court's decision in *Zobrest v. Catalina Foothills School Dist.*, 113 S.Ct. 2462 (1993), the Second Circuit ruled there is no constitutional impediment to the provision of consultant teacher and teaching aide services on-site within the premises of the parochial school Colleen's parents wish her to attend. It then proceeded to determine that IDEA and its accompanying regulations require that the District provide such on-site services.

According to the Second Circuit, IDEA and its accompanying regulations afford public school districts only limited discretion to deny students with disabilities voluntarily placed by their parents at non-public schools with on-site services at the premises of their non-public schools. In its view, public school districts may deny on-site services to non-public school students only where the cost of providing such services would exceed the cost of providing the same within the public schools. (pp. 1a-16a, *infra*). Petitioner's request for en banc review was denied. (pp. 65a-66a, *infra*).

Commencing with the 1992-1993 school year, and throughout the pendency of the administrative and court proceedings in this litigation, Colleen has received educational services in a mainstreamed integrated setting within the District's public schools, pursuant to an individualized education program developed by the District in consultation with Colleen's parents. Colleen's parents, have had no objection as to the nature or quality of these services, but only as to where the services have been provided.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Misunderstands Applicable Law and Regulations Governing a Public School District's Responsibility to Provide Services to Students with Disabilities Voluntarily Enrolled by their Parents at a Non-Public School.

The Individuals with Disabilities Education Act ("IDEA"), (20 U.S.C. §§1400 *et seq.*), is a federal statute designed to assist states and local public school districts in the education of children with disabilities. As such, grant awards authorized by Part B of the statute are contingent upon state and local school district assurances that a "free appropriate public education will be available for all children with disabilities." (20 U.S.C. §1412(2)(B)).

Parents, however, may refuse a public education for their children. Thus, IDEA and its accompanying regulations (34 C.F.R. Part 300) delineate separately the rights of students with disabilities voluntarily enrolled by their parents in non-public schools (20 U.S.C. §1413(a)(4)(A); 34 C.F.R. §§300.403, 300.450-300.452). As further discussed below, these rights are distinct not only from those of students receiving a public education, but also from those enjoyed by students enrolled in non-public schools by a state agency or local public school district when necessary programs and services are not readily available within the public schools themselves. (pp. 9a-12a, *infra*; 20 U.S.C. §1413(a)(4)(B); 34 C.F.R. §§300.400-300.403). Contrary to the determination of the Second Circuit, nothing within this statutory and regulatory scheme compels public school districts to provide students with disabilities voluntarily attending non-public schools with

on-site consultant teacher and teaching aide services on the premises of their non-public schools.

Because petitioner asserts that neither IDEA nor its accompanying regulations require it to provide the contested on-site consultant teacher and teaching aide services on the premises of a non-public school, petitioner will not address the constitutional issue of whether the provision of such services at a parochial school violates the Establishment Clause. In not addressing the constitutional issue, petitioner has deferred to this Court's pronouncement that " [i]t is a fundamental rule of judicial restraint . . . that this Court will not reach constitutional questions in advance of the necessity of deciding them." *Three Affilitated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.*, 467 U.S. 138, 157 (1984), citing *Leroy v. Great Western United Corp.*, 443 U.S. 173, 181 (1979); *Massachusetts v. Westcott*, 431 U.S. 322, 323 (1977); *Alexander v. Louisiana*, 405 U.S. 625, 633 (1972); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-48 (1936) (concurring opinion); *Whalen v. United States*, 445 U.S. 684, 702 (1980) (Rehnquist, J., dissenting)).

(a) The rationale of the court below – In ruling that IDEA and its accompanying regulations compel public school districts to provide on-site consultant teacher and teaching aide services to disabled students voluntarily attending non-public schools, (pp. 9a-16a, *infra*), the Second Circuit opined that public school districts enjoy very limited discretion to deny such services, "at least where differences in costs of provision do not exist." (pp. 13a, *infra*).

(b) Misunderstanding of applicable law and regulations – The Second Circuit's decision misunderstands IDEA's statutory and regulatory scheme. First, it is based not on the statutory language of IDEA itself but, rather, on its own singular interpretation of an isolated regulatory provision applicable to the implementation of IDEA. Second, the specific regulatory provision relied on by the Second Circuit, is just one of several provisions merely cross-referenced by the IDEA Regulations and found within the Education Division General Administrative Regulations, which are more commonly known as the EDGAR Regulations (34 C.F.R. Part 76), and generally applicable to state-administered federal programs. (pp. 9a, *infra*). Third, the various other EDGAR regulatory provisions additionally cross-referenced by the IDEA Regulations mirror the statutory language of IDEA itself and its regulations neither of which, as further discussed below, require that public school districts provide on-site services to students voluntarily attending non-public schools on the premises of the non-public schools. The applicable provisions of the IDEA Regulations themselves also track the statutory language, as well. Fourth, the Second Circuit's decision is in conflict with the official opposite position long-espoused by the U.S. Secretary of Education and the U.S. Department of Education on this issue. (pp. 11a-12a, *infra*).

(c) The statutory scheme – IDEA affords children with disabilities attending public schools the right to a "free appropriate public education" from the public school district where they reside. (20 U.S.C. §§1412(1), (2)(C), 1414(a)). A free appropriate public education under the statute consists of special education and related

services provided at public expense and in conformity with an individualized education program tailored to meet the unique needs of each individual child. (20 U.S.C. §§1401(18), 1414(a)(5); 34 C.F.R. §§300.341, 300.346).

The obligation of a public school district toward disabled children voluntarily enrolled by their parents in non-public schools, however, is different. While IDEA authorizes the provision of services for these children, it distinguishes between the rights of students with disabilities receiving an education under the auspices of public school authorities and those voluntarily placed by their parents in non-public schools. (20 U.S.C. §§1412(2)(B), 1413(a)(4)(A),(B)). Specifically, for instance, IDEA provides that public school districts are not required to pay for the education of non-public school students at any such school or facility. (20 U.S.C. §1413(a)(4)(B)(i)). It does provide, however, that non-public school students be given an opportunity to "participate" in IDEA programs "to the extent consistent with the number and location of children with disabilities in the State who are enrolled in private elementary and secondary schools . . . " (20 U.S.C. §1413(a)(4)(A)).

By its plain language, the requirement that non-public school students be given an opportunity to participate in IDEA programs under conditions specified by the statute does not impose on public school districts an obligation to provide on-site consultant teacher and teaching aide services to disabled students voluntarily attending non-public schools. Moreover, and as further discussed below, the official interpretation of IDEA by the U.S. Secretary of Education and the U.S. Department of Education impose no such obligation either. Indeed, in

explaining the rights of disabled students attending non-public schools under IDEA, the governmental official and entity responsible for overseeing the implementation of the statute have long opined that such students are not even entitled to the full range of services available to students with disabilities attending public school.

The statutory distinction as to the rights of disabled students attending public school and those voluntarily enrolled by their parents in non-public schools is further marked by additional separate provisions pertaining to the rights of students with disabilities placed in private school by public school authorities, when public school authorities are unable to provide necessary programs and services themselves. The latter are afforded the same right to a free appropriate public education enjoyed by disabled students enrolled within the public schools. (20 U.S.C. §1413(a)(4)(B)).

(d) The regulatory scheme – With respect to disabled students voluntarily attending non-public schools, the IDEA Regulations, officially known as the Assistance to States for the Education of Children with Disabilities Program Regulations, (34 C.F.R. Part 300), parallel the requirements of IDEA itself. They provide that public school districts are not financially responsible for the education of such students at any such schools (34 C.F.R. §300.403). They also provide that students with disabilities voluntarily enrolled by their parents in non-public schools are to be allowed participation in IDEA programs "to the extent consistent with their number and location in the State . . . " (34 C.F.R. §300.451(a)). Nothing within the IDEA Regulations themselves entitle non-public

school students with disabilities to on-site services on the premises of their non-public schools.

The IDEA regulations cross-reference certain provisions of the EDGAR Regulations, mentioned above, which pertain specifically to the "Participation of Students Enrolled in Private Schools" in state-administered programs. (34 C.F.R. §§76.651-76.662, 300.451(b)). These provisions are not incongruous with the requirements of IDEA and the IDEA Regulations. They provide, for instance, that non-public school students are to be given "a genuine opportunity for equitable participation" in state-administered federal programs. (34 C.F.R. §76.651(a)(1)). In addition, the required opportunity for equitable participation is to be "consistent with the number of eligible private school students and their needs" (34 C.F.R. §76.651(a)(2)). Nonetheless, the EDGAR regulations also provide that non-public school students are to receive "program benefits . . . comparable in quality, scope and opportunity . . . " to those provided to "students enrolled in public schools" (34 C.F.R. §76.654(a)).

It was this latter provision of the EDGAR regulations which the Second Circuit relied on in support of its decision below, that public school districts must provide students with disabilities voluntarily attending non-public schools with on-site consultant teacher and teacher aide services on the premises of such schools. (pp. 9a-15a, *infra*). In plain language, however, the term comparable does not mean identical. Instead, it involves associations which are similar and dissimilar in nature. (Webster's New World Dictionary 283 (3d C.ed. 1988). Moreover, nothing in the language or history of IDEA or the IDEA

Regulations serves to attribute a different meaning to the term as it is applied to a comparison between the rights of students with disabilities voluntarily attending non-public schools and those enrolled in the public schools.

As set forth above, IDEA, the IDEA Regulations and the EDGAR Regulations themselves provide disabled students voluntarily attending non-public schools with the ability to obtain services, consistent with their "number and location." In the Second Circuit's view, however, these provisions serve merely to further limit the discretion and ability of public school districts to deny on-site services to non-public school students to instances when the cost of providing such services would exceed that of providing the same within the public schools. (pp. 12a-15a, *infra*). Again, however, nothing in the history of IDEA or it regulations support this interpretation.

(e) Administrative interpretation – As mentioned above, the Second Circuit's decision is also inapposite to the long-held interpretation of IDEA and its accompanying regulations followed by the U.S. Secretary of Education and the U.S. Department of Education. In their view, the statute distinguishes between the rights of disabled students attending non-public schools and those enrolled in the public schools. Public school districts are not required to provide disabled students attending non-public schools the same services they would receive if they attended public school. (*Response to Hon. Mitch McConnell*, 22 IDELR 369 (1994); *OSEP Memorandum 94-17*, 20 IDELR 1440 (1994); *Response to Inquiry from Robert R. Davila*, 16 EHLR 1398 (1990)).

The Second Circuit expressly rejected the position of the governmental official and agency responsible for overseeing the implementation of IDEA and the promulgation of the very regulations at issue herein, (pp. 11a-12a, *infra*), even though it dates back to when the original IDEA regulations were adopted. (*See*, 49 Fed. Reg. 48522 (Dec. 12, 1984)). The U.S. Secretary of Education explained as much in direct response to public comments concerning subsequent proposed changes to the IDEA regulations in 1984, when he further indicated that IDEA affords public education agencies "the discretion to devise . . . the most efficient scheme possible for providing adequate special education and related services to a number of, but not necessarily all, private school handicapped children." (*Id.*).

The Second Circuit's reliance on its own interpretation of the "comparable benefits" provision in the EDGAR regulations is clearly in conflict with the official governmental position pertaining to a public school district's responsibilities toward disabled student voluntarily attending non-public school. Under this Court's precedent in *Thomas Jefferson University v. Shalala*, 114 S.Ct. 2381, 2386-87 (1994), the Second Circuit should have afforded deference to the U.S. Secretary of Education and U.S. Department of Education's official interpretation of their own regulations, in the absence of any evidence that their interpretation of their own regulations is inconsistent with IDEA itself.

2. The Decision Below Conflicts With The Decisions of Two Other U.S. Circuit Courts of Appeals.

The decision below also conflicts with the decision of two other circuit courts of appeal concerning the same issue as to whether IDEA compels public school districts to provide special education and related services to students with disabilities voluntarily enrolled by their parents in a non-public school on-site at the premises of their non-public school.

In *Goodall v. Stafford County School Dist.* (*Goodall I*), 930 F.2d 363 (4th Cir.), *cert. denied* 502 U.S. 864 (1991), the United States Court of Appeals for the Fourth Circuit ruled that a public school district was not obligated to provide the services of a cued speech interpreter to a hearing-impaired student on-site at the premises of his non-public school, either under IDEA, its accompanying regulations, or the Free Exercise Clause of the First Amendment to the U.S. Constitution. According to the Fourth Circuit, where a school district provides services to students with disabilities within the premises of its own public schools, it is not required to make the services available to disabled students attending non-public schools on-site at the premises of the non-public school.

Unlike the Second Circuit in the decision below, the Fourth Circuit in *Goodall I* specifically rejected the notion that the "comparable benefits" provision of the EDGAR Regulations discussed above compels the provision of special education and/or related services on-site at the premises of non-public schools. In its analysis the Fourth Circuit examined and relied upon additional provisions within the IDEA and EDGAR Regulations that:

> [i]f a handicapped child has available a free appropriate public education and the parents choose to place the child in the private school or facility, the public agency is not required by this part to pay for the child's education at the private school or facility. However, the public agency shall make services available to the child as provided under §§300.450-300.460. (34 C.F.R. §300.403(a)).
>
> A subgrantee shall provide students enrolled in private schools with a genuine opportunity for equitable participation in accordance with the requirements of §§76.652-76.662 *and in the authorizing statute and implementing regulations for a program.* (Emphasis added.) (34 C.F.R. §76.651(a)(1)).

The Fourth Circuit also relied on the U.S. Department of Education's interpretation of its own regulations discussed above, and rejected by the Second Circuit. (930 F.2d at 367-369).

In the Fourth Circuit's view, a ruling that public school districts are compelled to provide services to students with disabilities on-site at the premises of the non-public schools their parents voluntarily choose for them to attend would interfere "with the educational policy choices that Congress deliberately left to state and local school officials. Whether a particular service or method can feasibly be provided in a specific special education setting is an administrative determination that state and local officials are far better qualified and situated than [a court] to make." (*Id.*, at 367-368, citing *Barnett v. Fairfax County School Board*, 927 F.2d 146, 152-153 (4th Cir. 1991)). Furthermore, if a public school district's offer of services

at a site other than the non-public school attended by a student with disabilities proves " 'meaningless', it is because of . . . parent[al] decisions and conditions for [their child's] education, not by the operation of . . . law." (930 F.2d at 369).

Likewise, in *K.R. v. Anderson Community School Corp.*, 81 F.3d 673 (7th Cir. 1996), the U.S. Court of Appeals for the Seventh Circuit also ruled that IDEA and its accompanying regulations do not compel public school districts to provide services to students with disabilities on-site at the premises of the non-public school their parents have voluntarily elected for them to attend. The services at issue in *K.R. v. Anderson*. were those of a full-time instructional assistant.

Similar to the Fourth Circuit in *Goodall I*, the Seventh Circuit in *K.R. v. Anderson* concluded that "public school districts are given discretion under the law and need only provide voluntarily placed private school students a genuine opportunity for equitable participation." (*Id.* at 680). Like the Fourth Circuit, the Seventh Circuit refused to rely on the "comparable benefits" provision of the EDGAR Regulations as dispositive of the issue. (*Id.* at 677-680). In its view, such an approach "is problematic because it focuse[s] only on one section of a rather complex set of statutory and regulatory provisions. And not insignificantly, the . . . conclusion contradicts the conventional understanding of the IDEA, including the [U.S.] D[epartment] O[f] E[ducation]'s understanding." (*Id.* at 678).

In its analysis, the Seventh Circuit explained that IDEA differentiates between students with disabilities

who attend public schools, those who are placed at a private school by public school authorities and those who are voluntarily placed by their parents at a private school. And, with respect to the latter, IDEA requires that they be allowed to participate in IDEA programs only "'to the extent consistent with the number and location of children with disabilities' enrolled in private schools." (*Id.*). In reaching its final conclusion, the Seventh Circuit relied not only on the "equitable participation" provisions considered by the Fourth Circuit in *Goodall I*, but also on the "number and location" provisions discussed above and expressly rejected by the Second Circuit in the decision below. (*Id.*).

The Seventh Circuit further opined that public school districts enjoy discretion not only in deciding which benefits to provide to disabled students attending non-public schools, but also to "legitimately regulate the provision of expensive services, such as full-time assistants, in order to ration limited resources across more students." (*Id.* at 679). In its view, the "comparable benefits" provision subsequently relied on by the Second Circuit in its decision below "must be interpreted in a manner that permits public schools discretion in providing services to voluntarily placed private school students" consistent with applicable statutory provisions. (*Id.*).

Petitioner respectfully requests that this Court take notice a petition for writ of certiorari was filed with this Court in *K.R. v. Anderson*, on August 26, 1996 (No. 96-323), and that two federal district court decisions involving similar issues are presently pending before two other circuit courts of appeals. Thus, clarification from this Court would be critical to a final resolution of the

issues. *Fowler v. Unified School Dist. No. 259*, 900 F.Supp. 1540 (D.Kan 1995), is presently on appeal to the United States Court of Appeals for the Tenth Circuit. *Cefalu v. East Baton Rouge Parish School Bd.*, 907 F.Supp. 966 (M.D. La. 1995), is presently on appeal to the Fifth Circuit. Both involve the provision of interpretive services on-site at a non-public school. Both relied on the district court decision overturned by the Seventh Circuit to rule that IDEA obligates public school districts to provide such services. In the past, federal district courts in other jurisdictions have reached conclusions different to those in *Fowler* and *Cefalu*. (*e.g., Tribble v. Montgomery County Board of Educ.*, 798 F.Supp. 668 (M.D.Ala. 1992); *McNair v. Cardimone*, 676 F.Supp. 1361 (S.D. Ohio 1987), *aff'd on other grounds*, 872 F.2d 153 (6th Cir. 1989)).

Based upon the great confusion which exists across the nation regarding the provision of services to students with disabilities voluntarily attending non-public schools, a review by this Court is warranted and is most essential. Moreover, to the extent that the Second Circuit committed error in concluding that public school districts enjoy only limited discretion in their ability to deny on-site services to such students, its decision impairs the ability of public school districts to provide educational benefits and opportunities to all students enrolled within the public schools.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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Dated: Albany, New York
November 15, 1996

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 996 August Term, 1995

(Argued: February 1, 1996 Decided Jun. 12, 1996

Docket No. 95-7756

COLLEEN RUSSMAN, a child with disabilities, by her parents, PATRICIA and PAUL RUSSMAN,
Plaintiffs-Appellees,

v.

THOMAS SOBOL, as Commissioner of the New York State Education Department,
Defendant,

BOARD OF EDUCATION OF THE ENLARGED CITY SCHOOL DISTRICT OF THE CITY OF WATERVLIET, NEW YORK,
Defendant-Appellant.

Before: OAKES, WINTER, and WALKER, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the Northern District of New York (Con. G. Cholakis, *Judge*) granting summary judgment for the plaintiffs. Plaintiffs' complaint alleged, *inter alia*, that the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*, requires a school district to provide a disabled student with a teaching aide and consultant at a

parochial school and that such action does not violate the Establishment Clause of the First Amendment. We affirm the district court's grant of summary judgment for the plaintiffs.

CORY HAINES, Law Intern, Disabilities Law Clinic of Albany Law School, Albany New York (Nancy M. Maurer; Joseph Connors; Michael Cardinale, law intern, of counsel), *for Plaintiff-Appellee.*

STEPHEN F. BAILLY, Hicks & Bailly, Albany, New York, *for Defendant-Appellant.*

Michael L. Co[illegible]llo, Albany, New York (Richard E. Barnes, John A. Liekweg, Mark A. Mainello, of counsel), *for Amicus Curiae New York State Catholic Conference.*

Gerald A. Rosenberg, Rosenman & Colin, New York, New York (John F. Finnegan, Bruce M. Sabados, Rosemary Halligan, Stacey B. Creem, of counsel), *for Amici Curiae New York State Schools are for Everyone, the National Association of Protection and Advocacy Systems, and Western New York Disability Law Coalition.*

Jay Worona, Albany, New York (Pilar Sokol, of counsel), *for Amicus Curiae New York State School Boards Association, Inc.*

WINTER, *Circuit Judge*:

This appeal presents important questions concerning obligations imposed upon public school authorities by the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*, and the constitutionality of those obligations under the Establishment Clause of the First Amendment. Colleen Russman and her parents commenced this suit against the Board of Education of Watervliet, New York (the "school district"), alleging that the school district's refusal to provide Colleen special education services at a parochial school violates Section 1413 of New York Educ. Law § 3602-c, and the Free Exercise Clause of the First Amendment to the United States Constitution. On cross-motions for summary judgment, Magistrate Judge Smith granted judgment for the school district on the grounds that: (i) IDEA forbids the school district from using federal funds to provide instructional services at a parochial school; (ii) New York law does not require the school district to provide special education services at parochial schools; and (iii) such aid is forbidden by the Establishment Clause of the First Amendment to the United States Constitution. Judge Cholakis reversed Magistrate Smith's ruling and granted summary judgment for the Russmans.[1] The school district appeals, and we affirm.

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[1] Although Judge Cholakis's opinion suggests that some issues of fact remain for trial, *see Russman v. Board of Education*, No. 93-CV-905, slip op. at 5-6, 12 n.12 (N.D.N.Y., June 30, 1995), a final judgment was nevertheless entered for plaintiffs. We see no issue for trial.

BACKGROUND

The pertinent facts are not in dispute and were set forth in detail in the two district court opinions, *Russman v. Board of Educ.*, No. 93-CV-905, slip op. (N.D.N.Y., June 30, 1995); *Russman v. Board of Educ.*, No. 93-CV-905, slip op. (N.D.N.Y., June 22, 1994), familiarity with which is assumed. Colleen Russman, currently fifteen years old, has been classified as mentally retarded since 1986. For the first five years of her schooling, Colleen was educated in classes set aside by the school district exclusively for children with disabilities. In the Spring of 1991, Colleen's parents asked the school district's Committee on Special Education to develop an Individualized Educational Program ("IEP") for Colleen that would allow her to be "mainstreamed" into a regular, age-appropriate class. The IEP developed by the district called for the services of a consultant teacher to work with the regular classroom teacher in modifying the academic curriculum for Colleen and a teaching aide to assist Colleen directly with her studies. It provided as well for speech and occupational therapy. The parties agree that the mainstream program is appropriate for Colleen and that the services described in the IEP are necessary for her to be mainstreamed successfully. Agreement ends here.

Colleen and her parents wish to implement the IEP at St. Brigid's Regional Catholic School, the school that Colleen's two sisters attend. The Russmans can and will pay St. Brigid's tuition, but they cannot afford to pay for the support services of a consultant teacher and a teaching aide. The Russmans do not seek special education services in connection with religious courses but only in connection with core academic subjects such as math and

English. The school district refuses to implement the plan at a parochial school. Although the district provides speech and occupational therapy to other students at a "neutral" site at St. Brigid's, the school district contends that the provision of a consultant teacher and a teaching aide for Colleen at St. Brigid's would violate the Establishment Clause of the First Amendment.

The school district's decision to provide Colleen with special education benefits only at a Watervliet public school was upheld by an impartial hearing officer on December 24, 1992. That decision was affirmed by the state review officer of the New York State Education Department on March 8, 1993. Subsequently, Colleen, then eleven years old, and her parents brought the present action alleging that the failure to provide the services at St. Brigid's violates the Free Exercise Clause of the First Amendment to the United States Constitution as well as federal and state statutory law. During the pendency of the administrative proceedings and this litigation, Colleen has had her IEP implemented in a Watervliet public school.

DISCUSSION

We review a district court's grant of summary judgment *de novo, United States v. Articles of Banned Hazardous Substances,* 34 F.3d 91, 96 (2d Cir. 1994), affirming only where there are no genuine issues of material fact and the moving party is entitled to judgment as matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986).

A. *The Establishment Clause*

The First Amendment of the United States Constitution provides in relevant part that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. The school district argues that the Establishment Clause prohibits it from implementing Colleen's IEP at St. Brigid's. We disagree.

Where government programs are made available to a broad class of citizens defined in a religion-neutral fashion, the individuals receiving the benefits may choose to use them in a religious setting, and the program does not thereby violate the Establishment Clause. *See Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481 (1986) (Establishment Clause does not forbid blind student studying at Christian college from receiving generally available state assistance distributed to blind students for vocational training); *Mueller v. Allen*, 463 U.S. 388 (1983) (state law that provided tax deductions for certain educational expenses not unconstitutional even though deductions might primarily benefit parents whose children attended sectarian schools); *see also Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 115 S. Ct. 2510, 2521-24 (1995) (state university does not violate Establishment Clause by funding printing services for student newspaper with heavily Christian themes where printing services are provided as part of policy of funding all student newspapers without respect to religion).

In *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), the Supreme Court held that a public school district may constitutionally use IDEA funds to provide a sign language interpreter for a deaf student at a Catholic

high school. *Id.* at 13. Under *Zobrest*, the provision of governmental services to a religious school will survive a First Amendment challenge if: (i) the services are provided in a neutral manner without regard to religion; (ii) the services are provided at the parochial school not as a result of legislative choice but rather as a result of the private choice of the individual utilizing the services; and (iii) the funds traceable to the government do not "find their way into the sectarian schools' coffers." *Zobrest*, 509 U.S. at 10-11.

The special assistance required by Colleen's IEP would satisfy these factors if provided at St. Brigid's. First, the assistance is a neutral governmental service made available without regard to religion. *See id.* at 10. Second, the teaching aide and teaching consultant will provide services at St. Brigid's solely because of a decision made by the Russman family. *See id.* Third, the special education benefits flow directly to Colleen and do not financially benefit St. Brigid's. *See id.* (funds spent on special education services under IDEA not comingled with funds belonging to sectarian schools); *see also Rosenberger*, 115 S. Ct. at 2523-24 (where school pays third-party contractor to perform services to program beneficiaries and funds are not paid directly to religious organization, benefit received by religious organization is incidental and does not violate Establishment clause). Thus, provision of the stipulated services to Colleen falls within the scope of permissible activity under *Zobrest*.

We are not persuaded by the school district's argument that under *Meek v. Pittenger*, 421 U.S. 349 (1975), and *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985), it is prohibited from providing such services to Colleen. In

Meek and *Ball* the Court struck down government programs that provided teachers, counselors, teaching materials, and equipment to sectarian schools. However, both cases involved massive grants provided directly to the parochial schools so as to benefit the religious institutions financially. *See Meek*, 421 U.S. at 364-65 (direct loan of teaching material and equipment, as well as teachers and guidance counselors, to private schools, 75 percent of which were religious); *Ball*, 473 U.S. at 375-79 (discussing school district's shared time and community education programs, which provided classes to sectarian school students at public expense). These cases are therefore inapposite.

The school district also fails to persuade us that *Zobrest* authorizes only entirely mechanical assistance, such as verbatim translations by sign language or physical assistance in traveling. Although we recognize that, unlike the sign-language interpreter in *Zobrest*, the teaching aide and consultant here provide cognitive assistance, this distinction is not dispositive. The primary purpose of both a sign language interpreter and a teaching aide is solely to make the material intelligible to the disabled student, not to create a particular religious message or to advance a particular religious viewpoint. In such cases there is little danger of "excessive entanglement" by government actors with religion. *See Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971). To hold otherwise would interpret *Zobrest* in a way that distinguishes between students with physical disabilities, for whom mechanical assistance is necessary, and those with mental disabilities, for whom cognitive assistance is necessary, for purposes of IDEA. The statute makes no such distinction, and we decline to

carve one into the Constitution. Because we decline to differentiate between cognitive and physical assistance, the parties' dispute over whether religious content can be found in St. Brigid's core curriculum is immaterial.

We turn now to the question of whether the state is required to provide these services at non-public schools.

B. *The Individuals with Disabilities Act*

The IDEA conditions monetary grants to states by requiring that they provide a "free appropriate public education" to disabled children, 20 U.S.C. § 1412(1), including special education or other services as needed by particular children, 20 U.S.C. §§ 1412(4), § 1414(a)(5). If necessary, a state may place a disabled child in a private school at public expense. 20 U.S.C. § 1413(a)(4)(B).

The statute imposes somewhat different obligations regarding disabled children who are voluntarily placed in private schools. It requires states to "provid[e] for such children special education and related services." However, this obligation is limited by the phrase "to the extent consistent with the number and location of" such children in a state. Turning to pertinent regulations, 34 C.F.R. § 300.403, provides that:

> [i]f a child with a disability has a [free appropriate public education] available and the parents choose to place the child in a private school or facility, the public agency is not required by this part to pay for the child's education at the private school or facility. However, the public agency shall make services available to the child as provided under [various regulations].

Other regulations state that school districts must afford to children who attend private schools benefits that are "comparable in quality, scope, and opportunity for participation to the program benefits that the [district] provides for students enrolled in public schools." 34 C.F.R. § 76.654(a). They also require that each local educational authority "provide special education and related services designed to meet the needs of private school children with disabilities."

The school district argues that although the IDEA requires it to provide Colleen with special education services, nothing in the statute or regulations requires that the school district provide the services on-site at a private school. The caselaw on this issue is mixed. At least two district courts have held that the IDEA compels states to provide on-site benefits to handicapped children at non-public schools. *See Cefalu v. East Baton Rouge Parish Sch. Bd.*, 907 F. Supp. 966 (M.D. La. 1995) (IDEA requires school district to provide sign-language interpreter for deaf student at parochial school); *Fowler v. Unified Sch. Dist. No. 259*, 900 F. Supp. 1540 (D. Kan. 1995) (school district required to provide interpretive services for deaf student at private, non-sectarian school).

However, two courts of appeals have held to the contrary. In *Goodall v. Stafford County Sch. Dist.*, 930 F.2d 363 (4th Cir.), *cert. denied*, 502 U.S. 864 (1991), the Fourth Circuit held that where a school district offered to provide services to disabled students at a public school, the Education of the Handicapped Act ("EHA"), an earlier version of the present IDEA, *see* Education of the Handicapped Amendments of 1990, Pub. L. No. 101-476, § 901, 104 Stat. 1103, 1141 (1990) (revising short title), did not

require that the district make the services available to students at a sectarian school. In *K.R. v. Anderson Community School Corporation*, 81 F.3d 673 (7th Cir. 1996), the Seventh Circuit held that a school district had discretion under the IDEA and pertinent regulations to decline to offer a full-time instructional assistant to a student at a private school so long as such an assistant was offered to the student at the public school. *Cf. McNair v. Cardimone*, 676 F. Supp. 1361 (S.D. Ohio 1987) (EHA does not compel provision of transportation to and from private school for child with hearing impairments), *aff'd*, 872 F.2d 153, 156-57 (6th Cir. 1989) (affirming on ground that transportation is not service required by child's disability but refusing to reach question whether EHA compelled provision of necessary services to handicapped children attending private schools).

It appears that the Department of Education shares the view that the IDEA affords some discretion regarding the on-site provision of special educational services at private schools. *See* 20 Individuals With Disability [sic] Educ. L. Rep. 1440 (1994) (memorandum stating that private school children need only be afforded genuine opportunity for equitable participation and have no entitlement to full range of services offered public school children); 22 Individuals With Disabilities Educ. L. Rep. 369 (1994) (response letter stating same); 16 Educ. for Handicapped L. Rev. 1398-1400 (1990) (response letter stating that whether or not public school needs to provide on-site services at private school depends on specific facts); 49 Fed. Reg. 48522 (1984) (public schools have "discretion to devise . . . the most efficient scheme possible for providing adequate special education and related

services to a number of, but not necessarily all, private school handicapped children"); 45 Fed. Reg. 22570 (1980) (public school need offer only genuine opportunity for equitable participation and what constitutes "genuine opportunity" will "vary widely, depending on local circumstances");

Although we do not take the position that the IDEA requires the on-site provision at private schools of any and all services that might be required in the context of public education, we read the statute to accord greater rights to disabled children voluntarily in private schools than do some of the authorities cited above. In particular, we view *Goodall* as unpersuasive. *Goodall* relied, *inter alia*, on 34 C.F.R. § 76.532, which prohibits the use of IDEA funds for "religious . . . instruction." 930 F.2d at 369. This regulation is coextensive with the Establishment Clause and does not create any separate regulatory limitation on IDEA. *See Zobrest*, 509 U.S. at 7 n.7. Central to *Goodall's* holding was its view that provision of special services to a student in a parochial school would be unconstitutional and thus violative of Section 76.532. Because we hold that the provision of services to Colleen Russman at St. Brigid's does not violate the Establishment Clause, *see supra*, we conclude that it likewise does not violate Section 76.532.

Although *Anderson* is somewhat more persuasive, it nevertheless accorded excessive discretion to school authorities to deny the on-site provision of services to disabled students in private schools. *Anderson* relied principally on the different statutory and regulatory language used with regard to disabled students attending public schools and those voluntarily placed in private schools.

Based on these differences, it concluded that there was "little doubt that . . . Congress intended to give disabled students voluntarily attending private school a lesser entitlement," 81 F.3d at 678, and permitted school authorities to refuse to provide an instructional assistant to a disabled student in a private school. *Id.* at 679.

Anderson is unquestionably correct that the rights accorded disabled students in public schools differ from those accorded such students voluntarily placed in private schools. However, the principal difference stems from the IDEA language limiting the obligation of states to provide special education and related services to private school students "to the extent consistent with the number and location" of disabled children voluntarily in public schools. *Anderson* failed, however, to analyze the import of the specific language with regard to the individualized service that was denied.

In our view, the quoted reference to the "number" of students involves services to groups of students rather than the individualized service at issue in *Anderson* and in the present case. If, to take a simple example, one occupational therapist can efficiently aid five disabled students and three therapists are available in a public school attended by fourteen such children, public school authorities are not required by the IDEA to provide a therapist to a private school with only one such student. In our view, the statute affords discretion to offer occupational therapy to the private school child only at a public school because of the higher per-student cost of providing it at the private school. However, nothing in the quoted language suggests that, where a private school is

attended by five disabled children and the cost per student of providing an occupational therapist at the private or public school is identical, school authorities may limit such services to the public school. Nor does the language suggest that an individually tailored service may be offered only at a public school. The reference to the "number" of students suggests only that school districts have discretion to deny on-site provision of services at private schools where economies of scale in providing the services at one place exist.

With respect to the statutory reference to "location," we read the IDEA to mean only that, where the provision of services at a distant private school would entail significant additional costs, e.g., transportation, to be borne by the state, public school authorities may fulfill their IDEA obligations by offering the services at a local public school.

We do not, therefore, agree with *Anderson*'s vesting of school authorities with broad discretion to deny on-site individualized services to private school students. Indeed, apart from the limiting language discussed above, the statute and regulations are more consistent with mandatory entitlements than with discretionary authority. Where the cost of special services does not vary with where they are provided, the IDEA and regulations regarding voluntary private school students make little sense if such services may be made available only in the public schools. The statute and regulations require that necessary services be provided to disabled private school students according to their needs rather than the name of their school, *see Zobrest*, 509 U.S. at 13, and state that such services must be "comparable in quality, scope, and

opportunity for participation" to those offered to public school students. 34 C.F.R. § 76.654. Use of the word "comparable" strongly suggests that the provision of services will usually take place outside the public school. Otherwise, the regulation would simply provide that any services for the disabled available at a public school must be open to private school students.

Moreover, if services required by the IDEA need be provided only in public schools even absent fiscal concerns, then private school students are entitled under the IDEA to little more than after-school services. Most services required by an IEP must be provided during school hours to be effective. For example, a teaching consultant cannot benefit a disabled student in a private school if available only outside her school and divorced from her curriculum. If public school authorities may freely refuse to provide such benefits at private schools, therefore, disabled students must either forgo the IDEA benefits, bear their cost, or transfer to the public schools. This result, however, seems to be precisely what the statute and regulations seek to preclude. Indeed, the principal purpose of the statutory and regulatory commands appears to make a child's disability irrelevant to the family's choice of school, at least where differences in costs of provision do not exist.

Turning specifically to the facts of the present case, no claim is made by the school district that providing Colleen Russman with a teaching consultant and teaching aide at St. Brigid's is significantly more expensive than providing the same services at the public school. Indeed, the only reason offered by the district for the denial of

services is its view that the Establishment Clause prohibits the on-site provision of such services at a parochial school, an issue disposed of above. To obtain the benefits to which she is entitled under the IDEA, Colieen has been forced to abandon her choice of school, a result contrary to the purpose of the statute. We therefore hold that the IDEA requires the school district to provide Colleen with the consultant and aide at St. Brigid's.

In view of our disposition of this matter, we need not address the Russmans' Free Exercise and state law claims.

We therefore affirm.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF
NEW YORK

93-CV-905

IN THE MATTER OF THE
APPEAL OF COLLEEN RUSSMAN,
A CHILD WITH DISABILITIES, BY
HER PARENTS, PATRICIA AND
PAUL RUSSMAN,

Plaintiffs,

-against-

BOARD OF EDUCATION OF THE
ENLARGED CITY SCHOOL
DISTRICT OF THE CITY OF
WATERVLIET,

Defendant.

APPEARANCES:	OF COUNSEL:
DISABILITIES LAW CLINIC OF ALBANY LAW SCHOOL 80 New Scotland Avenue Albany, New York 12208	Nancy M. Maurer, Esq. Lisa Schreiner and Louis Maslow, II Law Interns
HICKS & BAILLY, ESQS. Attorneys for Defendant 744 Broadway Albany, New York 12207	Stephen F. Bailly, Esq.

CON. G. CHOLAKIS, D.J.

MEMORANDUM DECISION AND ORDER

Colleen Russman, a student residing in the Watervliet School District, has been identified as mentally retarded since 1986; and, until 1991, she was placed in a variety of segregated public educational programs. In the Spring of 1991, her parents requested that the Committee on Special Education ("CSE") develop an individualized Educational Program ("IEP") which would allow Colleen to be "mainstreamed" – *i.e.*, included in a "regular" classroom setting. The further desire of the Russmans, to have this IEP implemented at St. Brigid's Regional Catholic School, is at the core of the controversy in this case.

The IEP developed by the CSE provided for the services of a consultant teacher and a teaching aide[1], as well as on-site speech and occupational therapy. The parties agree that such an inclusion program is appropriate for Colleen and that, in order for this program to be successful, the services set forth in the IEP must be provided. Nevertheless, the provision of the consultant teacher and teaching aide[2] *at a sectarian location* was ultimately denied

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[1] This IEP provides for consultant teacher services for 1/2 hour per day of direct assistance in reading, math, and language arts, and 1/2 hour per day of indirect consultation with the classroom teacher regarding modification of test and classroom assignments for reading, English, spelling, penmanship, math, social studies, science, and health. The IEP also provides for a teaching aide to give "support teaching" to Colleen in reading, English, spelling, penmanship, math, social studies, science, and health.

[2] The parties agree that the speech and occupational therapy may properly be provided at St. Brigid's.

by the CSE, based upon its determination that such services would violate the Establishment Clause of the First Amendment to the U.S. Constitution.

As a result, plaintiff commenced the instant action, claiming that this denial of services violates: (1) Section 1413 of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*; (2) New York Education Law § 3602-C; and (3) the Free Exercise Clause of the First Amendment to the U.S. Constitution. Both parties consented to proceed before Magistrate Judge Ralph W. Smith (with an election to appeal to the district judge) and an Order of Reference was signed and filed by this Court on April 18, 1994. Subsequently, by Memorandum-Decision and Order dated June 22, 1994 ("MDO"), Magistrate Judge Smith denied plaintiff's motion for summary judgment and granted defendant's motion for summary judgment – finding that the provision of the services of a consultant teacher and a teaching aide at St. Brigid's would violate both federal law, *i.e.*, 34 C.F.R. § 76.532(a)(1)[3], and the Establishment Clause. Presently before this Court is plaintiff's appeal of the judgment entered in accordance with this MDO.

"The standard applied by a reviewing court to determine whether summary judgment was properly granted

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[3] 34 C.F.R. § 76.532(a)(1) states:

> (a) No State or subgrantee [*i.e.*, local school district] may use its grant or subgrant to pay for any of the following:
>
> (1) Religious worship, instruction, or proselytization.

is the same as that applied by the [lower] court initially under Rule 56(c)."[4] *Burtnieks v. City of New York*, 716 F.2d

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[4] Pursuant to the standard set forth in Fed.R.Civ.P. 56(c), summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c).

In deciding such a motion, the Court is not to resolve disputed issues of fact, but rather, to assess whether a genuine issue regarding a material fact remains for the trier of fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

Summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Daniel P. Foster, P.C. v. Turner Broadcasting System, Inc.*, 844 F.2d 955, 959 (2d Cir. 1988), *cert. denied* 488 U.S. 994, 109 S.Ct. 559, 102 L.Ed.2d 585 (1988) (quoting *Celotex v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986)). The record is assessed in a light most favorable to the non-movant, and all reasonable inferences are drawn in the non-movant's favor. *See Ramsuer v. Chase Manhattan Bank*, 865 F.2d 460, 465 (2d Cir. 1989). A non-movant who bears the ultimate burden of proof, however, must demonstrate that there is *some* evidence which would create a genuine issue of material fact. *See Twin Laboratories, Inc. v. Weider Health and Fitness*, 900 F.2d 566, 568 (2d Cir. 1990). This evidence cannot be "conclusory allegations," id., or "mere speculation," *Howard v. Gleason Corp.*, 901 F.2d 1154, 1159 (2d Cir. 1990), but rather something more than a "scintilla of evidence", *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), and more than "some metaphysical doubt as to the material facts". *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). "Furthermore, summary judgment cannot be avoided by immaterial factual disputes". *Howard v. Gleason Corp.*, 901 F.2d at 1159.

982, 985 (2d Cir. 1983) (citing C. Wright, A. Miller & M. Kane, 10 *Fed.Prac. & Proc.* § 2716 (2d ed. 1983)).

One of the basic tenets of this standard is that "[c]redibility determinations, the weighing of evidence and the drawing of legitimate inferences from the facts are jury functions [or the trier-of-fact at trial], not those of a judge . . . ruling on a motion for summary judgment[.] *Anderson*, 477 U.S. at 255. In reaching his decision, however, Magistrate Judge Smith made numerous findings of fact material to the law as he applied it.

Regarding his determination that federal law would be violated, the Magistrate Judge found that "the evidence does not support [plaintiff's] assertion that '(r)eligious themes are specifically addressed only in a separate religion class[,] [and] there is no religious content to any of the courses or activities for which Colleen requires assistance pursuant to her IEP[;] *[but] [r]ather, it is clear from the transcripts and exhibits submitted that religious instruction is included in the various academic classes at St. Brigid's*. MDO, p.5 (quoting plaintiff's Rule 10(j) Statement at ¶ 20) (emphasis added). In reaching this conclusion, he found "incredibl[e]" the testimony of St. Brigid's principal, Ms. Ana Yeomans, "that there is no religious aspect to teaching courses other than religion," *id.* at 6, and found further that her "contradict[ory]" and "inconsisten[t]" testimony did not warrant a denial of summary judgment due to an issue of material fact. *Id.* at 7. However, although the evidence may overwhelmingly favor a finding that religious instruction is included in the various academic classes at St.Brigid's, Yeomans' testimony did create a factual dispute *material* to the law as applied by Magistrate Judge Smith.

Moreover, in finding that the Establishment Clause would be violated, he found that

> here we are dealing with a teacher and a teaching aide who have to modify the **content** of the academic classes for Colleen. *I do not agree with plaintiffs' characterization of the consultant teacher and the aide as mere interpreters of the course materials.*

Id. at 12 (first emphasis in original, other emphasis added).

These findings supported his further determination that "by requiring the consultant teacher to modify the academic classes for Colleen, and by requiring the teaching aide to give direct individual teaching support to Colleen in subjects which have religious content, they would be furthering the religious mission of the school." *Id.* at 13.

However, the resolution of the underlying factual disputes which support such a determination is not a function of a judge on a motion for summary judgment. Accordingly, the summary judgment in favor of defendant must be reversed.

In addition, this Court is not in agreement with the Magistrate Judge's interpretation of the applicable law: under a recent Supreme Court decision, the finding that religious instruction is included in academic course of St Brigid's is irrelevant to the present Establishment Clause issue. That decision, relied on by both parties to support their opposing opinions, and the case upon which Magistrate Judge Smith based his decision regarding the Establishment Clause, was issued in the recent Supreme Court

case of *Zobrest v. Catalina Foothills School District*, ___ U.S. ___, 113 S.Ct 2462, 125 L.Ed.2d 721 (1993)[5]. In *Zobrest* the Supreme Court held that a public school district did not violate the Establishment Clause by providing a sign-language interpreter under the IDEA to a deaf student in a parochial school "in order to facilitate his education." *Id.*, 113 S.Ct at 2469.

In reaching this holding, the Supreme Court first recognized that it had "consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an establishment clause challenge just because sectarian institutions may also receive an attenuated benefit." *Id.*, 113 S.Ct. at 2466. Two factors support such a holding: (1) the program's benefits are " 'made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited[,]' " *id.* at 2467 (quoting *Witters v. Washington*

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[5] In *Zobrest*, the Supreme Court acknowledged that § 76.532 – the regulation upon which Magistrate Judge Smith found a violation of federal law – does not create a separate regulatory limitation on the IDEA, but "merely implements the Secretary of Education's understanding of (and thus is coextensive with) the requirements of the Establishment Clause." *Zobrest*, 113 S.Ct. at 2465, n.7. In other words, § 76.532 is merely a regulation " 'based on the Department's interpretation of [the] constitutional requirements[,]' " authorized by the Secretary's general rulemaking power, and providing no greater constraint than the Establishment Clause upon which it is based. *Id.* (citations omitted) Thus, the Supreme Court went on to consider the violation of that constitutional clause rather than a specific violation of the regulation. This Court will do the same.

Dep't of Services for Blind, 474 U.S. 481, 487 (1986)[6]; and (2) " '[a]ny aid provided under [a] program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choice of aid recipients[,] . . . [as a result,] [t]he program . . . creates no financial incentive for students to undertake sectarian education.' " *Id.* (quoting *Witters*, 474 U.S. at 487-88)[7].

As in *Zobrest*,

> [t]hat same reasoning applies with equal force here. *The service at issue in this case is part of a general government program that distributes benefits neutrally to any child qualifying as "handicapped" under the IDEA, without regard to the "sectarian-nonsectarian, or public-nonpublic nature" of the school the child attends. By according parents freedom to select a school of their choice, the statute ensures that a government-paid [consultant teacher and teaching aide] will be present in a sectarian school only as a result of the private decision of individual parents.* In other words, because the IDEA creates no financial incentive for parents to choose a sectarian school, [the consultant teacher or teaching aide's] presence there cannot

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[6] *See also Mueller v. Allen*, 463 U.S. 388, 398 (1983) (the provision of the program's benefits to a broad spectrum of families – "whether their children attend public school or private – strongly indicates a *secular* effect).

[7] *See also Mueller*, 463 U.S. at 399 (because public funds become available to sectarian schools "only as a result of numerous private choices of individual parents of school-age children," such a program is distinguished from other programs which involve "the direct transmission of assistance from the State to the schools themselves" in violation of the Establishment Clause).

> be attributed to state decisionmaking. Viewed against the backdrop of *Mueller* and *Witters*, then, . . . *[w]hen the government offers a neutral service on the premises of a sectarian school as part of a general program that "is in no way skewed towards religion," Witters*, supra, at 488, 106 S.Ct., at 752, *it follows under our prior decisions that provision of that service does not offend the Establishment Clause.* See *Wolman v. Walter*, 433 U.S. 229, 244, 97 S.Ct. 2593, 2603, 53 L.Ed.2d 714 (1977). Indeed, this is an even easier case than *Mueller* and *Witters* in the sense that, under the IDEA, *no funds traceable to the government ever find their way into sectarian schools' coffers.* The only indirect economic benefit a sectarian school might receive by dint of the IDEA is the handicapped child's tuition – and that is, of course, assuming that the school makes a profit on each student; that, without an IDEA [consultant teacher and teaching aide], the child would have gone to school elsewhere; and that the school, then, would have been unable to fill that child's spot.

Zobrest, 113 S.Ct at 2467-68.

Thus the present case, as was *Zobrest*, is distinguishable from those cases[8] where *direct* grants of aid from the government "relieved sectarian schools of costs they otherwise would have borne in educating their students[,]" *id.*, 113 S.Ct at 2468 – "this kind of direct aid is indistinguishable from the provision of a direct cash subsidy to the religious school." *Ball*, 473 U.S. at 395. Here, "[t]he extension of aid to the [Russmans], however, does not

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[8] *e.g., Meek v. Pittenger*, 421 U.S. 349 (1975) *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985).

amount to 'an impermissible "direct subsidy" ' of [St. Brigid's]." *Zobrest*, 113 S.Ct at 2468-69 (quoting *Witters*, 474 U.S. at 487). "Handicapped children, not sectarian schools, are the primary beneficiaries of the IDEA; to the extent sectarian schools benefit at all from the IDEA, they are only incidental beneficiaries." *Id.*, 113 S.Ct at 2469.

The Supreme Court also distinguished *Zobrest* by recognizing that "the task of a sign-language interpreter seems . . . quite different from that of a teacher or guidance counselor" and, moreover, that "the Establishment Clause lays down no absolute bar to the placing of a public employee in a sectarian school." *Id.*, 113 S.Ct at 2469[9]. This distinction focused on the "parents[']hav[ing] chosen of their own free will to place [their child] in a pervasively sectarian environment[,] [and that] [t]he sign-language interpreter they have requested *will neither add to nor subtract from that environment*, and hence the provision of such assistance is not barred by the establishment Clause." *Id.*, 113 S.Ct at 2469 (emphasis added)[10]. In at

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[9] The Supreme Court has "made clear that 'the provision of health services to all schoolchildren – public and nonpublic – does not have the primary effect of aiding religion,' even when those services are provided within sectarian schools." *Zobrest*, 113 S.Ct at 2469, n.10 (quoting *Wolman v. Walter*, 433 U.S. 229, 242 (1977)).

[10] Rather than basing its holding upon a determination that, "[t]he sign-language interpreter . . . will neither add to nor subtract from [the sectarian] environment," the Supreme Court offered this statement as part of its second reason for distinguishing the *Zobrest* case from *Meek* and *Ball*. The holding in *Zobrest* is primarily founded upon: (1) a recognition that the aid is dispensed not to sectarian schools but to individual handicapped children: and (2) that the choice to enroll in a sectarian school is that of the child or the child's parents.

least one recent case, *K.R. v. Anderson Community School Corp.* 1995 WL 318859, *11 (S.D.Ind., May 25, 1995), the holding of *Zobrest* was extended to allow the provision of an "instructional assistant" at a private parochial school.[11]

Thus, notwithstanding the public employee's physical presence in a sectarian school, assisting in religious education, the Supreme Court held such aid to be constitutionally permissible, despite the fact that this employee would "convey[] religious messages." *Zobrest*, 113 S.Ct at 2472 (Blackmun, J. dissenting) ("A state-employed sign-language interpreter would be required to communicate the material covered in religion class, the nominally secular subjects that are taught from a religious perspective, and the daily Masses at which [the sectarian school] encourages attendance for Catholic students. In an environment so pervaded by discussions of the divine, the interpreter's every gesture would be infused with religious significance."); *see also id.*, 113 S.Ct. at 2468-69.

[11] The court in *Anderson Community School* focused on the IDEA's requirement that a student at a private school, in need of a particular benefit which can only be meaningfully provided in-class or on-site, must "receive a benefit comparable to the benefit she would receive if she attended public school . . . [and such benefit] must be provided . . . at her private school." *Anderson Community School*, 1995 WL 318859, *3 (citing 34 C.F.R. § 76.654(a).

34 C.F.R. § 76.654(a)) provides:

> Comparable benefits. The program benefits that a subgrantee [local school district] provides for students enrolled in private schools must be comparable in quality, scope, and opportunity for participation to the program benefits that the subgrantee provides for students enrolled in public schools.

Thus, federal law would appear to moot any contention that New York State law does not require a school district to provide such benefits on-site at a private school.

Thus, because the services set forth in Colleen's IEP are to be provided through a "general program that is in no way skewed towards religion[,]" under which "no funds traceable to the government ever find their way into sectarian schools' coffers[,]" *id.*, 113 S.Ct. at 2467-68, any factual determination regarding the inclusion of religious instruction in the various academic classes at St. Brigid's is irrelevant to consideration of an Establishment Clause violation under *Zobrest*. The only determination remotely necessary under *Zobrest* is whether or not the provision of the consultant teacher and a teaching aide is a "neutral service": *i.e.*, will the modifications they make to facilitate Colleen's education *add or subtract* from the sectarian environment of St. Brigid's, or will they merely make it *accessible* to Colleen?

Although such services might add to the secular *educational* environment at St. Brigid's, there is no evidence that the provision of a consultant teacher and teaching aide would add to the *religious* environment at the school. Moreover, if the provision of these services at a public school would not add a religious element to that environment, those same services should not bring such an additional element to the sectarian environment at St. Brigid's. The record demonstrates that the defendant has come forth with no admissible evidence to show that such services will add or subtract from the sectarian environment of St. Brigid's, having focused instead on the presence of religious instruction in the various academic classes at St.Brigid's. Thus, the defendant has not

demonstrated the existence of a material factual dispute regarding this issue.[12]

Accordingly, the Magistrate Judge's denial of plaintiff's motion for summary judgment is hereby reversed.

IT IS SO ORDERED.

/s/ Con. G. Cholakis
CON. G. CHOLAKIS,
JUDGE
UNITED STATES
DISTRICT COURT

DATED: Albany, New York
June 30, 1995

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[12] This is an element essential to the District's defense of the case, and upon which the District will bear the burden of proof at trial. The allegation of an Establishment Clause violation is raised by the District in the face of plaintiff's otherwise undisputed entitlement to such benefits under the IDEA.

APPENDIX C

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

IN THE MATTER OF THE APPEAL OF COLLEEN RUSSMAN, A CHILD WITH DISABILITIES, BY HER PARENTS, PATRICIA AND PAUL RUSSMAN

V.

BOARD OF EDUCATION OF THE ENLARGED CITY SCHOOL DISTRICT OF THE CITY OF WATERVLIET

JUDGMENT IN A CIVIL CASE

(Filed Jul. 6, 1995)

CASE NUMBER: 93-CV-905 (CGC)

___ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[XX] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that upon plaintiff's appeal of the Judgment entered June 28, 1994, and in accordance with the Memorandum Decision and Order of the Honorable Con. G. Cholakis, U.S. District Judge, dated June 30, 1995, the findings by the U.S. Magistrate Judge for summary judgment in favor of defendant is reversed and the denial of plaintiff's motion for summary

judgment is reversed. Judgment shall enter in favor of plaintiff.

JULY 6, 1995. — *Date*

GEORGE A. RAY — *Clerk*

/s/ Sandra S. Haker
SANDRA S. HAKER
(By) Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT
OF NEW YORK

In the Matter of the Appeal of
COLLEEN RUSSMAN, a Child
With Disabilities, by her parents,
PATRICIA and PAUL
RUSSMAN,

Plaintiffs,

vs.

Civil No.
93-CV-905 RWS

BOARD OF EDUCATION OF
THE ENLARGED CITY SCHOOL
DISTRICT OF THE CITY OF
WATERVLIET,

Defendant.

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RALPH W. SMITH, JR.
United States Magistrate
Judge

MEMORANDUM-DECISION AND ORDER

By Order dated April 18, 1994, the Honorable Con. G. Cholakis referred this matter to the undersigned for all further proceedings and the entry of judgment upon consent of the parties in accordance with 28 U.S.C. § 636(c) and Fed. R. Civ. P. 73.

Colleen Russman is eleven years old and since 1986 has been classified as mentally retarded. For the 1991-92 school year her parents proposed that she receive an inclusion program in which for the first time she would be placed in a regular, age-appropriate class and receive support services from the School District (hereinafter "the District").

The Individualized Educational Programs (hereinafter "IEPs") developed by the District Committee on Special Education (hereinafter "CSE") in 1991 and 1992 recommended that Colleen receive the assistance of a consultant teacher[1] and a teaching aide[2] as well as speech

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[1] The IEP for the 1992-93 school year provided for consultant teacher services for one hour per day, which includes one-half hour of direct assistance in reading, math, and language arts, and the other half hour of indirect consultation with the classroom teacher concerning test modification and classroom assignments for reading, English, spelling, penmanship, math, social studies, science, and health. The consultant teacher modifies the academic curriculum to make it appropriate for Colleen.

[2] The 1992-93 IEP provides for a teaching aide to provide "direct support teaching services" to Colleen in reading, English, spelling, penmanship, math, social studies, science, and health. The aide works directly with Colleen, rather than with the classroom teacher or the other children in the class, and

and occupational therapy. The parties agree that an inclusion program is appropriate for Colleen and that in order for her to benefit from education in a regular classroom, she must receive the support services identified in her IEP. They disagree, however, as to where the IEP should be implemented.

Colleen's parents want her to receive her education at St. Brigid's Regional Catholic School (hereinafter "St. Brigid's), a private sectarian school. Initially they stated that they wanted Colleen to attend St. Brigid's because they wanted her to go to the same school as her two younger sisters.[3] (11/15/91 Hearing Transcript at 137-38, 143, 156). However, during a subsequent administrative hearing they added that their decision was also based upon religious reasons and the small class sizes.

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is supervised primarily by the consultant teacher, but some supervision would occur between the mainstream teacher and the aide. (See 10/15/92 Hearing Transcript at 30-32 – Record on Appeal #14).

[3] Colleen's mother stated at the administrative hearing:

> We wanted Colleen at St. Brigid's because our other children are there. That's important to us and it's important to Colleen. She should be in school with her sisters. She has all the right to be there. They are her sisters. They miss each other. The emotional turmoil has – it has caused my children – it's not fair. They cannot attend the same activities together. Sometimes they have different days off or different vacations. It's not normal for children of different – to go to different schools from the same family. They need to be a family. She needs to feel like a part of them.

(11/15/91 Hearing Transcript at 137-38).

(10/15/92 Hearing Transcript at 196). Although Colleen's parents can and will pay St. Brigid's tuition, they cannot afford to pay for the support services of a consultant teacher and a teaching aide.

The District has provided speech and occupational therapy to other students at a "neutral" site at St. Brigid's. The parties agree that Colleen may receive such therapy at the parochial school.[4] The District, however, has refused to provide Colleen with a consultant teacher and teaching aide on site at St. Brigid's. This refusal was ultimately upheld by an impartial hearing officer on December 24, 1992, who found that the provision of services on site at a sectarian school would violate the Establishment Clause of the First Amendment of the United States Constitution. (Attachment B to the Complaint). That decision was affirmed by the State Review Officer of the New York State Education Department on March 8, 1993. (Attachment C to the Complaint).

During the pendency of the administrative proceedings[5] and this action, Colleen has had her IEP implemented at a public school, Watervliet Elementary School. The testimony at the administrative hearings shows that

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[4] In fact, the Supreme Court has rejected a First Amendment challenge to a state providing on-site diagnostic speech services at a neutral site. *Wolman v. Walter*, 433 U.S. 229, 244-48 (1977) (noted recently in *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S.Ct. 2462, 2469 n.10).

[5] For purposes of this decision it is unnecessary to summarize the administrative history.

Colleen has profited significantly in this inclusion program. However, her parents continue to seek implementation of the IEP at St. Brigid's.

Presently before the court are cross-motions for summary judgment. Plaintiffs assert that (1) the District's refusal to implement Colleen's IEP at St. Brigid's violates state and federal education law; (2) requiring the District to provide Colleen with a consultant teacher and teaching aide at St. Brigid's does not offend the Establishment Clause of the First Amendment; and (3) the District's denial of such services to Colleen at St. Brigid's violates her free exercise of religion under the First Amendment. Defendants, however, disagree with each of these contentions. After a very careful review of the briefs and the exhibits, this court finds that summary judgment should be granted to the defendant.

I. FEDERAL AND STATE EDUCATION LAW

Plaintiffs contend that federal and state education law entitle Colleen to receive the educational support services identified in her IEP on site at St. Brigid's. I have reviewed the arguments and citations of counsel, but I am persuaded by defendant's arguments to the contrary.

Defendant correctly notes that the regulations implementing the Individuals with Disabilities Education Act (hereinafter the "IDEA") forbid the use of federal funds to pay for "religious worship, instructions, or proselytization." 34 C.F.R. § 76.532(a)(1). The court recognizes that plaintiffs do not seek any services from the District for religion classes or any of the school's religious activities,

such as daily prayers, holiday prayer services, and attendance at First Friday Masses. However, the evidence does not support their assertion that "[r]eligious themes are specifically addressed only in a separate religion class. There is no religious content to any of the courses or activities for which Colleen requires assistance pursuant to her IEP." (Plaintiffs' Rule 10(j) Statement at ¶ 20). Rather, it is clear from the transcripts and exhibits submitted that religious instruction is included in the various academic classes at St. Brigid's. Therefore, section 76.532(a)(1) of the regulations precludes the District from providing the services of a consultant teacher and a teaching aide who would have to modify these classes for Colleen.

The school principal, Ms. Ana Yeomans, testified at her deposition that religious music is typically played during the school's Christmas concert in December and that seasonally there would probably be religious themes to the students' art work (Yeomans' deposition at 19). Moreover, as defendant correctly points out, St. Brigid's written philosophy is that "Our responsibility is to foster the total Christian in a Catholic environment, **Christian morals and principles should permeate all disciplines.**" (Yeomans' deposition at 17) (emphasis added). Yeomans testified that that philosophy is printed on a page from the school's calendar handbook. (Yeomans' deposition at 16). She and the faculty formulated the philosophy, which was presented to the regional school board and pastors for their approval. (Yeomans' deposition at 16). It is usually reviewed by the faculty in the spring. (Yeomans' deposition at 17). Yeomans agreed that the responsibility stated in the philosophy is kept in mind in implementing

the curriculum each year. (Yeomans' deposition at 18). Despite this statement, she incredibly further testified that there is no religious aspect to teaching courses other than religion, although she noted that she "could see where at times there might be an issue raised in an academic course that might generate some values discussion, but not religious beliefs or requirements." (Yeomans' deposition at 23). Her "interpretation of [the philosophy statement] is that we are open to discussion of principals [sic] and values in the classroom in the academic areas if they should arise. That is if they are posed by the student, that we would not be closed to not discussing that." (Yeomans' deposition at 26).[6]

This latter deposition testimony is further contradicted by the minutes of an earlier CSE meeting on May 14, 1992, which summarizes Yeomans' testimony at that meeting. According to these minutes:

> In response to a question by the CSE Chairperson, **Mrs. Yeoman's [sic] testified that religious concepts are introduced during the course of instructional presentations** at St. Brigid's in subjects such as Science, Social Studies, and Health. For example, one might expect the Catholic Church's religious position on abortion and euthanasia to be brought up during class [sic] Science and Health. . . .

(Record on Appeal; Minutes of 5/14/92 CSE meeting) (emphasis added). The minutes of a CSE meeting the

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[6] The court does not believe that the recent inconsistency of Ms. Yeomans warrants a denial of the summary judgment motions due to an issue of material fact.

following week further states that "Mrs. Yeoman's [sic] indicated that although religious issues might be discussed by a St. Brigid's teacher during class discussion, students were not tested on religious concepts during class assignments, or tests." During that meeting she presented the CSE Chairperson with the school's philosophy statement. (Record on Appeal; Minutes of 5/21/92 CSE meeting).

Furthermore, during an administrative hearing on October 15, 1992, Stephen Hennessey, who is a school psychologist employed by the District and is chairperson of the CSE, testified about his discussions with Colleen's parents. He stated:

> We discussed the nature of the classes at St. Brigid's, to what extent religious doctrine is introduced during discussions and in science, social studies and health for example. **Mrs. Yeomans indicated that the teachers do feel free to discuss religious issues to the class, you know, the church's doctrine on abortion and euthanasia.** It is something that could come out during the discussions but not part of the curriculum.

(10/15/92 hearing transcript at 28) (emphasis added).

Later, Colleen's mother testified at that hearing. Her testimony also shows that religious instruction, including the teaching of Christian morality, is part of St. Brigid's academic classes. During her examination she stated in relevant part:

> Q How is religion . . . to what extent is religion taught at St. Brigid's?

A They have religious class every day. They carry out, I guess Christian morality – I'm not sure of the word I want – throughout the day.

Q Is there a religious aspect that is involved in teaching all classes at St. Brigid's?

A Like I said, there's the Christian morality throughout the whole day, you know, but one plus one is two.

HEARING OFFICER: Well, if they have reading, do they read the lives of the Saints instead of Winnie the Pooh?

THE WITNESS: It will include all things. Obviously they're going to study about saints or whatever. It's a Catholic school.

HEARING OFFICER: But outside religion class, that's what I'm saying.

THE WITNESS: For instance, social studies. If they should come upon Roe versus Wade, of course they may discuss what their version of abortion is or what they believe. But they're not going to force that opinion on you. They don't tell you that you can't do this, you know.

. . .

Q Would you say that religious aspects of the school come into play throughout the day.

A To a certain extent, yes. . . . They are not looking for things in science to teach religion about. If these things come up, they bring them up and they talk about them. Religion class is the place for that.

. . .

> Q . . . would you expect that [the church's] views would be taught in the school?
>
> A They teach them their views, but again, they cannot force their opinions on someone. They say this is how the Catholic church feels.
>
> . . .
>
> Q . . . I gather one of the reasons you want Colleen to go to St. Brigid's in addition to being with her sisters, in addition to being benefited by the smaller classes, is so that she can be exposed to the Catholic aspects of things.
>
> A That's right.

(10/15/92 hearing transcript at 207-08; 212; 219). She did testify that she did not expect the consultant teacher to modify any religious aspect of the curriculum for Colleen, but she did not want to diminish the Catholic impact of the education at St. Brigid's. (Transcript at 217, 220-23).

I find that given the school's philosophy and the religious content of the academic classes, federal law forbids the District from using federal funds to provide the services of a consultant teacher and a teaching aide on site at St. Brigid's.

Furthermore, defendant also correctly notes that New York State statutes and regulations do not **require** a school district to provide special education and related services on site at private schools. *Board of Educ. of the Monroe-Woodbury Cent. Sch. Dist. v. Wieder*, 72 N.Y.2d 174, 187-90 (1988). While plaintiffs note that the State Education Department recognizes that where "the only way to provide meaningful services is on-site of a sectarian

school, such services may be offered at the school" (citing *Handbook on Services to Pupils Attending Nonpublic Schools*), defendant correctly points out that all of the services identified in Colleen's IEP are available at Watervliet. Thus, it is clear that this is not a case where the only meaningful services available are obtainable exclusively at the sectarian school. As defendant states, if Colleen attends St. Brigid's, it will be the result of her parents' voluntary choice. Her attendance will not be because the services required can only be provide [sic] at St. Brigid's and nowhere else. Even if this were not the case, I further find that the provision of the on-site services would violate the First Amendment.

II. FIRST AMENDMENT

The First Amendment of the United States Constitution provides in relevant part that "Congress shall make no law respecting the establishment of religion. . . . " U.S. Const. amend I. The District asserts that this Establishment Clause prohibits it from implementing Colleen's IEP at St. Brigid's. Plaintiff disagrees.

Interestingly, both parties rely in part upon a recent Supreme Court decision, *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S.Ct. 2462 (1993), in support of their differing opinions. *Zobrest* involved a deaf student who asked his school district to provide a sign-language interpreter to accompany him to classes at a Roman Catholic high school pursuant to the Individuals with Disabilities Education Act (IDEA) and its Arizona counterpart. The Supreme Court found that "the Establishment Clause does not prevent the school district from furnishing him

with a sign-language interpreter there in order to facilitate his education." *Id.* at 2469.

In reaching this decision, the Court stated that "[t]he service at issue . . . is part of a general government program that distributes benefits neutrally to any child qualifying as 'handicapped' under the IDEA, without regard to the 'sectarian-nonsectarian, or public-nonpublic nature' of the school the child attends." *Id.* at 2467. The presence of the interpreter at the Catholic school could not be attributed to state decision-making because "the IDEA creates no financial incentive for parents to choose a sectarian school. . . . " *Id.* The Court stated that "[w]hen the government offers a neutral service on the premises of a sectarian school as part of a general program that 'is in no way skewed towards religion,' . . . it follows under our prior decisions that provision of that service does not offend the Establishment Clause." *Id.*

In addition, the Court distinguished the case at bar from previous decisions, *Meek v. Pittenger* 421 U.S. 349 (1975), and *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985), in two ways. "First, the programs in Meek and Ball – through direct grants of government aid – relieved sectarian schools of costs they otherwise would have borne in educating their students." *Id.* at 2468. "Second, the task of a sign-language interpreter **seems to us quite different from that of a teacher** or guidance counselor." *Id.* at 2469 (emphasis added). The Court noted that the interpreter would merely "accurately interpret whatever material is presented to the class as a whole" and thus concluded that he "will neither add to nor subtract from that environment, and hence the provision of such assistance is not barred by the Establishment Clause." *Id.*

In the instant case, as in *Zobrest*, it is clear that the IDEA does not create a financial incentive for Colleen's parents to choose a sectarian school. In addition, providing the services on site would not relieve the school of costs it would have otherwise had to bear in educating its students. However, this case is clearly distinguishable from *Zobrest* because here we are dealing with a teacher and a teaching aide who have to modify the **content** of the academic classes for Colleen. I do not agree with plaintiffs' characterization of the consultant teacher and the aide as mere interpreters of the course materials.[7] Unlike the interpreter in *Zobrest*, these District employees would be teaching or providing teaching support, not just translating the class discussions verbatim. As noted by defendant, unlike an interpreter, the consultant teacher will use his or her judgment in determining how best to present the material to Colleen and will interact with the regular teacher in order to present the materials to Colleen more effectively. Furthermore, the aide would be assisting Colleen in understanding the material presented in class and in focusing her attention to the class activities. Such duties are distinctly different from those neutral, mechanical duties of an employee who would merely be translating verbatim the teachings at the secular school.

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[7] Plaintiffs assert that "[i]n effect, the consultant teacher and the teaching aide serve as Colleen's 'interpreter' – developing and implementing the material so that the lesson plan of Colleen's regular classroom instructor can be effectively communicated to Colleen." (Plaintiffs' memorandum at 19).

In sum, based upon *Zobrest* I agree with the District that the Establishment Clause prohibits it from implementing Colleen's IEP on site at St. Brigid's. As fully discussed above, the academic courses at St. Brigid's include religious material. Thus, by requiring the consultant teacher to modify the academic classes for Colleen, and by requiring the teaching aide to give direct individual teaching support to Colleen in subjects which have religious content, they would be furthering the religious mission of the school. Even though Colleen and her class allegedly would not be tested on the religious content of the classes, and despite Colleen's mother's statement that she does not expect the District employees to modify the religious content of these classes, "[t]he potential for impermissible fostering of religion under these circumstances, although [possibly] somewhat reduced, is nonetheless present." *Meek v. Pittenger,* 421 U.S. 349, 372 (1975). I, therefore, find that the implementation of Colleen's IEP at St. Brigid's will impermissibly result in the direct advancement of religious beliefs by District employees and result in excessive entanglement of church and state.[8]

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[8] For these reasons, it appears that the implementation of Colleen's IEP at St. Brigid's may not meet the second and third prongs of the three-part test, established by the Supreme Court in *Lemon v. Kurtzman,* 403 U.S. 602 (1971), which has been used to determine whether there has been an Establishment Clause violation. Under the *Lemon* test, government action violates the Establishment Clause if any of the following three prongs is not satisfied: (1) the government action must have a secular purpose; (2) the action must not have the primary effect of advancing religion; and (3) the action must not create excessive entanglement between church and state. *Id.* at 612-13.

III. FREE EXERCISE OF RELIGION

The First Amendment of the United States Constitution also guarantees that "Congress shall make no law . . . prohibiting the free exercise [of religion]. . . . " U.S. Const. amend I. Plaintiffs assert that the District's refusal to implement Colleen's IEP at St. Brigid's has forced them to choose between their religious beliefs and receiving benefits under the IDEA. But for her disability, Colleen would be attending the parochial school along with her two sisters. Plaintiffs assert that the State may not burden an individual's sincerely-held religious beliefs unless such restriction serves a compelling state interest. (citing *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). They claim that such an interest does not exist in this case. I agree, however, with defendant that the avoidance of an Establishment Clause violation is a sufficient compelling state interest. *Zobrest v. Catalina Foothills Sch. Dist.*, 963 F.2d 1190, 1196 (9th Cir. 1992), *rev'd on other grounds*, 113 S. Ct. 2462 (1993); *Goodall v. Stafford County Sch. Bd.*, 930 F.2d 363, 370 (4th Cir. 1991).

WHEREFORE, for the foregoing reasons, it is

ORDERED, that plaintiffs' motion for summary judgment is denied, and it is further

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Although some Justices have questioned the continued us [sic] of the *Lemon* test, *see Rosenberger v. Rector*, 18 F.3d 269, 282 n.30 (4th Cir. 1994), it is clear that that test has not been overruled or modified. Nevertheless, both parties correctly note that the *Zobrest* Court did not utilize the *Lemon* test, and I have done likewise. I am satisfied that based on the Court's decision in *Zobrest*, the provision of the services of a consultant teacher and a teaching aide would violate the Establishment Clause.

ORDERED, that defendant's cross-motion for summary judgment is granted, and, therefore, it is further

ORDERED, that the Clerk shall enter judgment for the defendant.

IT IS SO ORDERED.

Dated: June 22, 1994
Albany, New York

/s/ Ralph W Smith Jr
United States
Magistrate Judge

APPENDIX E

[SEAL] No. 93-3

THE UNIVERSITY OF THE STATE OF NEW YORK
The State Education Department
State Review Officer

Application of a CHILD WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the City School District of the City of Watervliet.

Appearances:

Disabilities Law Clinic of Albany Law School, attorney for petitioners, Nancy M. Maurer, Esq., of counsel

Hicks and Bailly, Esq., attorneys for respondent, Stephen F. Bailly, Esq., of counsel

DECISION

Petitioners appeal from the determination of an impartial hearing officer which upheld the recommendation of respondent's committee on special education (CSE) that the services of a consultant teacher, classroom aide, a speech therapist and an occupational therapist not be provided to petitioners' child at the site of a private school selected by petitioner. The appeal must be dismissed.

Petitioner's eleven year old child is classified as mentally retarded. Her classification is not in dispute. In a May, 1991 psychological evaluation, the child achieved a verbal IQ score of 59, a performance IQ score of 45, and a

full scale IQ score of 48. In April, 1992, the child was assessed to be reading at a mid-first grade level, while her mathematic skills were at the kindergarten level. An independent evaluator testified at the hearing that the child was very adept socially, but that her speech was somewhat difficult for others to understand. The evaluator further testified that the child was academically weak in language and comprehension, and had some small motor deficits which were manifested in tasks such as writing and buttoning.

After attending a special education preschool program, the child was referred to respondent's CSE, which recommended that she be enrolled in a diagnostic development program of the Board of Cooperative Educational Services of Albany, Schoharie and Schenectady Counties (BOCES). The child was enrolled in the BOCES program for two years, after which she was enrolled for three years in a BOCES fundamental skills program.

Petitioners met with the CSE in the Spring of 1991, to request that the child be placed in a class with age appropriate peers for fourth grade during the 1991-92 school year, because they believed that a special class program was too restrictive and did not sufficiently challenge their child. Petitioners requested that respondent provide the child with the services of a part-time consultant teacher, a full-time aide, as well as speech therapy and occupational therapy, at the St. Brigid's Regional School, a parochial school in Watervliet which had been selected by petitioners. In June, 1991, the CSE recommended that the requested services be provided at the St. Brigid's Regional School. However, respondent rejected the CSE's recommendation.

Petitioners requested that an impartial hearing be held to review the action of respondent. In the interim, the child was placed by petitioners in a regular education class in respondent's elementary school, where she received the requested services. In a decision dated January 29, 1992, the hearing officer held that respondent was legally authorized and obligated to provide the requested services at the private school selected by petitioners.

Respondent appealed from the hearing officer's decision. In *Application of a Child with a Handicapping Condition*, Appeal No. 92-14, I annulled the hearing officer's decision, but did not reach the issue of the constitutionality of the provision of the requested services in the private school. I held that the process by which the child's individualized education program (IEP) had been developed was flawed because the child's mother had served as a parent member of the CSE, and that the IEP failed to specify whether the consultant teacher services were direct or indirect, or to identify the areas in which the child was to receive primary instruction from a special education teacher (cf. 8 NYCRR 200.4[c][2][iv]). I also found that the child's IEP should have delineated the responsibilities of the child's regular education and consultant teachers. The CSE was directed to reconsider its recommendation in a meeting to which representatives of the private school were invited to discuss the feasibility and implementation of the proposed program in the private school, and to clarify the role and supervision of the aide, in a manner consistent with the provisions of 8 NYCRR 80.33.

On May 14, 1992, the CSE met with petitioners, the principal of St. Brigid's and the child's prospective fifth

grade teacher at St. Brigid's. The child's fourth grade teacher in respondent's elementary school, who was also at the CSE meeting, told the CSE that the child had successfully participated in the teacher's class, with the assistance of the special educational services. The CSE revised the child's IEP for the 1991-92 school year, and discussed the feasibility of implementing the IEP in the private school. The principal of the private school advised the CSE that the IEP could be implemented in St. Brigid's, if the requested special educational services were provided. The CSE meeting was adjourned without a recommendation for the implementation of the child's IEP. The 1991-92 IEP, which is not part of the present record, was approved by the CSE at a subsequent meeting on May 21, 1992. The CSE again discussed the implementation of the child's IEP in St. Brigid's and then voted to recommend to respondent that the IEP could not be implemented in the private school. The CSE began preparing the child's IEP for the 1992-93 school year, but did not complete that IEP until the CSE's next meeting on May 27, 1992.

The child's IEP for the 1992-93 school year provides that the child be enrolled in a regular education fifth grade class, but receive a curriculum which is modified to meet her needs. The IEP further provides that the child is to receive 30 minutes per day of primary instruction by a consultant teacher for reading, mathematics, and language arts. The consultant teacher is to provide an additional 30 minutes per day of indirect service, consulting with the child's regular education teacher about the child's instruction in reading, English, spelling, penmanship, mathematics, social studies, science and health. The

consultant teacher is also to consult with the regular education teacher regarding the daily activities of a full-time teacher aide, and is to be primarily responsible for supervising the aide's performance of support teaching duties. The aide would provide support teaching in reading, English, spelling, penmanship, mathematics, social studies, science and health. The IEP also provides that the child shall receive three 30 minute periods of speech therapy per week and two 30 minute periods of occupational therapy per week. The child's speech therapist is also to consult with the consultant teacher once each week.

In view of the fact that the parties have stipulated that the child's IEP would be appropriate, I do not reach the issue of the appropriateness of providing only 30 minutes per day of primary special education instruction in reading, mathematics and language arts to the child, or the rationale for also having the child receive instruction in these subjects from her regular education teacher (*Hiller v. Bd. of Ed. Brunswick CSD et al.*, 674 F. Supp. 73 [N.D. NY, 1987]).

The CSE voted to recommend to respondent that the special educational services set forth on the child's 1992-93 IEP could not be delivered in an appropriate manner at the private school in which petitioners wished to enroll the child. Petitioners requested that an impartial hearing be held to review the CSE's recommendation. The record reveals that the child remained in respondent's elementary school for fifth grade during the 1992-93 school year. At the hearing which was held on October 15 and 16, 1992, the parties stipulated that the child's IEP was appropriate and that the hearing officer

should consider the record of the prior hearing in addition to the record to be developed at the new hearing. They further stipulated that respondent would provide speech therapy and occupational therapy to the child at St. Brigid's (cf. *Wolman v. Walters*, 433 U.S. 229; *Filler v. Port Washington UFSD*, 436 F. Supp. 1231 [E.D. NY, 1977]). In view of the parties' stipulation, I do not reach the issue of the provision of those services (*Hiller v. Bd. of Ed., supra*).

In a decision dated December 24, 1992, the hearing officer found that the CSE had prepared the child's IEP in accordance with the directives of my decision in Appeal No. 92-14. The hearing officer noted that little competent evidence had been presented at the hearing with regard to the manner in which St. Brigid's Regional School functioned or the way in which instruction was presented in the school. Nevertheless, he concluded that there was sufficient evidence to determine whether respondent could, consistent with the Establishment Clause of the First Amendment to the U.S. Constitution, provide the services of a consultant teacher and an aide at St. Brigid's. Relying upon the minutes of CSE meetings at which the St. Brigid's principal explained the philosophy and practices of that school, the hearing officer found that the school offered its students a religiously oriented curriculum, and held that providing the services of the consultant teacher and aide at the school would improperly advance religion and result in excessive government entanglement with religion (*Lemon v. Kurtzman*, 403 U.S. 602). The hearing officer further held that the respondent's denial of services to the child at St. Brigid's did not unlawfully abridge petitioners' or the child's rights under

the Free Exercise Clause of the First Amendment to the U.S. Constitution.

Petitioners assert that respondent is required by Federal and State law to provide the services of a consultant teacher and an aide at St. Brigid's school. However, petitioner's assertion that there is such a requirement is, at least, overstated. Federal regulations and state statute require each board of education to provide special education and related services designed to meet the needs of disabled children who reside within the school district and attend private school (34 CFR 300.403 and 300.452; Education Law Section 3602-c). Although petitioners' child was enrolled in respondent's schools when petitioners met with the CSE, petitioners stated their intention to enroll the child in St. Brigid's. Accordingly, respondent's CSE was obligated to offer an appropriate public school placement for the child, and an appropriate program of special education/and or related services if the child enrolled in St. Brigid's (*Application of a Child with a Handicapping Condition*, Appeal No. 91-13).

The U.S. Department of Education has opined that a board of education is not required by Federal law to make suitable educational services available to a child on the premises of the private school which the child attends (Goodall, 16 EHLR 1398; see also, *Goodall v. Stafford County School Board*, 930 F. 2nd 363 [4th Cir., 1991], cert. den. 112 S. Ct. 177). In New York, disabled children who are enrolled by their parents in private schools are eligible to receive special educational services from their respective boards of education pursuant to Section 3602-c of the Education Law. However, Section 3602-c does not require boards of education to provide services on the

premises of the private schools, but allows boards of education to determine an appropriate program for each child, within statutory guidelines and constitutional constraints (*Board of Education Monroe-Woodbury CSE v. Wieder et al.*, 72 NY 2nd 174).

Although a CSE may use its discretion in recommending an appropriate program, it must nevertheless recommend a program which can be implemented (*Matter of a Child with a Handicapping Condition*, 20 Ed. Dept. Rep. 138; *Matter of a Handicapped Child*, 21 *id.* 527; *Matter of a Handicapped Child*, 22 *id.* 571). There is no dispute about the appropriateness of the child's IEP, if the child attends respondent's elementary school. However, the CSE prepared a single IEP for the child, and recommended to respondent that the IEP could not be implemented if the child attended St. Brigid's. A child's IEP is the CSE's recommendation (8 NYCRR 200.4[c]). I find that the CSE's recommendation for petitioner's child is inherently contradictory, with regard to the child's attendance at St. Brigid's. The minutes of the CSE's meeting of May 21, 1992 reveal that the CSE considered, but then rejected, the option of providing some of the IEP services at respondent's elementary school and the rest of the services at the private school. However, the CSE made no recommendation for services to be provided to the child if the child enrolled in St. Brigid's. Therefore, the CSE has not met its obligation to recommend an appropriate program for a child who has been or will be enrolled in a private school (*Application of a Child with a Handicapping Condition*, Appeal No. 91-13).

Although the CSE should have recommended a program which it believed could have been implemented if

the child enrolled in the private school, the resolution of this matter would be needlessly delayed by ordering the CSE to make a new recommendation. The parties agree that the child's IEP prepared by the CSE is appropriate, and that the only area of disagreement is whether the IEP services can be provided on the premises of the private school. While the CSE did not offer any explanation for its recommendation that the IEP could not be implemented, it is readily apparent from the minutes of the CSE meetings and the position taken by respondent at the hearing that the CSE refrained from recommending that the services of a consultant teacher and aide be provided on the premises of St. Brigid's because it believed that respondent was constitutionally precluded from providing those services at the private school. Therefore, I find that it is necessary to reach the constitutional issue (*Goodall v. Stafford County School Board, supra*).

Upon review of the records of the first and second hearings, I find that there is some evidence about the program of the St. Brigid's Regional Catholic School. The CSE minutes of its May 14, 1992 meeting report that the principal of St. Brigid's told the CSE that religious concepts are introduced during the course of instructional presentations at St. Brigid's in subjects such as social studies, science and health, and that children were directed to pray four times each day at the school. At the May 21, 1992 CSE meeting, the principal of St. Brigid's presented the CSE chairperson with a written description of the school's philosophy, in which it was stated that:

> "Our responsibility is to foster the total Christian in a Catholic environment: Christian morals and principles should permeate all disciplines."

Petitioners do not dispute the hearing officer's finding that the private school offers a "religion-permeated academic curriculum." (Decision, page 15). I concur with the hearing officer's conclusion that the record presents a sufficient basis to support a determination of the constitutional issue.

The First Amendment to the United States Constitution reads, in material part, as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . "

Since 1948, the provision of the First Amendment have been held to be applicable to State funded assistance to children attending sectarian schools (*Everson v. Board of Education,* 330 U.S. 1).

This appeal presents issues premised upon both the Establishment Clause and the Free Exercise Clause. The Establishment Clause issue arises because petitioners seek to have a public school teacher and a public school aide provide services to their child on the premises of a sectarian private school. In *Lemon v. Kurtzman, supra,* the United States Supreme Court established a three-part test for ascertaining whether government action impermissibly establishes or results in active involvement in religious activity:

1. The government action must have a secular purpose;
2. The action must not have the primary effect of advancing religion; and
3. The action must not create excessive entanglement between church and state.

In applying the three-part *Lemon* test to both Federal and State funded activities, the Supreme Court had held that the challenged activity is unconstitutional if it does not meet each of the three parts of the *Lemon* standard. In *Lemon,* the Court held that the supervision needed to ensure that publicly funded teachers in parochial schools were not conveying religious messages would constitute an excessive entanglement of church and state. In 1975, the Court reached the same conclusion in invalidating a state program which provided guidance, testing, remedial and therapeutic services by school district employees on the premises of pervasively sectarian schools (*Meek v. Pittenger,* 421 U.S. 349). In *Meek,* the Court stated that:

> "Whether the subject is 'remedial reading,' 'advanced reading,' or simply 'reading,' a teacher remains a teacher and the danger that religious doctrine will become intertwined with secular instruction persists." (*Ibid,* at 370).

In 1985, the Court held that a school district's program of providing staff to teach classes to supplement core curriculum courses in sectarian schools and a second program of providing staff to teach voluntary "community education" courses in such schools after regular school hours violated each of the three parts of the *Lemon* test (*School District of the City of Grand Rapids et al. v. Ball et al.,* 473 U.S. 373. In the same year, the Court held that the New York City School District could not constitutionally use Federal funds received under the former Title I of the Elementary and Secondary Education Act of 1965 (now Chapter 1 of the Education Consolidation and

Improvement Act of 1981, 20 USC 3801) to pay the salaries of school personnel, including teachers, psychologists and social workers, who were assigned to parochial schools to provide remedial instruction to educationally deprived children (*Aguilar et al. v. Felton et al.*, 473 U.S. 402). Acknowledging that the board of education had adopted a supervisory system to prevent the Title I program employees from inculcating religious beliefs, the Court held that the supervisory system inevitably results in the excessive entanglement, and noted that:

> "The administrative cooperation that is required to maintain the educational program at issue here entangles church and state in still another way that infringes interests at the heart of the Establishment Clause . . . (because) the program necessitates 'frequent contacts between the regular and the remedial teacher . . . in which each side reports on individual student needs, problems encountered, and results achieved' . . . " (*Ibid* at 412).

The U.S. Department of Education has expressed the opinion that it would not "presume" to extend the ruling of the *Aguilar* decision to the provision of services to disabled children at the site of private schools pursuant to 20 USC 1400 et seq. (Orschel, 16 EHLR 1368). Nevertheless, two United States Circuit Courts of Appeal have held that the provision of interpreters to deaf children in sectarian schools under the authority of 20 USC 1400 et seq. would violate the Establishment Clause of the First Amendment (*Goodall v. Stafford County School Board, supra; Zobrest v. Catalina Foothills School District*, 936 F. 2nd 1190 (9th Cir., 1992). In *Zobrest*, the Court noted that even if the presence of a publicly funded interpreter were

limited to classes in which secular subjects were taught, i.e. other than religion, it could not be sustained because the supervision necessary to prevent the use of the interpreter to advance religion would require an excessive entanglement of church and state.

The *Zobrest* case is now pending before the U.S. Supreme Court. Whether the Court will adhere to the *Lemon* test, or articulate a new standard as some have urged, remains to be seen. At present, I am constrained to apply the *Lemon* test to the facts of this appeal. The educational program which the CSE designed for this child was described at the hearing as an inclusion program. Petitioners' expert witness testified about the purpose of the inclusion program and the duties of the consultant teacher as follows:

> "Well, the idea in providing a program for students in the regular classroom is to make use of the activities that exist in there but to modify either the input or the output, whatever the student is doing so that it is directly related to what she needs to learn. It is the same sort of modification but tied to what the other students are doing. In some ways it is very similar to what we do with groups of students who have various learning disabilities. We make the activities similar, related, but distinct for each group's needs or for each individual's needs.
>
> So, a consultant teacher would take charge of designing those specific activities in working with the regular classroom teacher to decide where in the schedule and which aspect of the IEP would be delivered." (Transcript, p. 141)

The child's program would be based upon the curriculum of St. Brigid's, with modifications as directed by the child's IEP and determined by the consultant teacher. It is an inescapable conclusion that the daily consultation between the consultant teacher and the child's regular education teacher at St. Brigid's could not be sustained under the third part of the *Lemon* test. The primary instruction which the consultant teacher would provide the child as a direct service cannot be analytically distinguished from the remedial instruction involved in *Aguilar,* and the supervision necessary to ensure that such instruction does not inculcate religion compels me to conclude that the provision of such instruction would not satisfy the third part of the *Lemon* test.

While the classroom aide would be ostensibly assigned to the child to support the special education program provided by the consultant teacher, the IEP discloses that the aide would assist the child in subjects for which she would not receive special education. In view of the private school's stated purpose of introducing religious concepts throughout the curriculum and the virtual absence of any public school supervision of the aide's activities, there is a substantial likelihood of advancing religion under the second part of the *Lemon* test. The activities of the classroom aide in support of the child's education program are clearly distinguishable from those of the personal hygiene aide involved in *Application of Bd. of Ed. City School District City of New York,* 24 Ed. Dept. Rep. 155, upon which petitioners rely.

Petitioners assert that the hearing officer erred in not balancing the competing constitutional interests of petitioners and respondent. They contend that their right to

freely exercise their religion has been circumscribed by respondent's refusal to provide their child with services at St. Brigid's compelling them to keep the child enrolled in respondent's elementary school. Petitioner's reliance upon Free Exercise Clause of the First Amendment is unavailing. Infringement by the government upon free exercise of religion is subject to strict scrutiny, and can be justified only by a compelling state interest. However, the avoidance of a violation of the Establishment Clause is a compelling state interest (*Goodall v. Stafford County School Board, supra; Zobrest v. Catalina Foothills School District, supra*).

Upon the record before me, I must uphold the hearing officer's decision.

THE APPEAL IS DISMISSED.

Dated: Albany, New York
March 8, 1993

/s/ Henry A. Fernandez
HENRY A. FERNANDEZ

APPENDIX F

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 27th day of June, one thousand nine hundred and ninety-six.

Present: HONORABLE JAMES L. OAKES,
HONORABLE RALPH K. WINTER,
HONORABLE JOHN M. WALKER,
(SEAL)

Circuit Judges.

COLLEEN RUSSMAN, a child with disabilities, by her parents, PATRICIA and PAUL RUSSMAN,
Plaintiffs-Appellees,

- v. -

No. 95-7756

THOMAS SOBOL, as Commissioner of the New York State Education Department,
Defendant,

BOARD OF EDUCATION OF THE ENLARGED CITY SCHOOL DISTRICT OF THE CITY OF WATERVLIET, NEW YORK,
Defendant-Appellant.

ORDER AMENDING OPINION

It is hereby ORDERED that the original opinion is amended on page 5139, lines 11-12 to read:

". . . disabled children voluntarily in private schools."

/s/ James L. Oakes
Hon. James L. Oakes, U.S.C.J.

/s/ Ralph Winter
Hon. Ralph K. Winter, U.S.C.J.

/s/ John M. Walker
Hon. John M. Walker, U.S.C.J.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 19th day of August one thousand nine hundred and ninety-six.

Russman

v Dkt No: 95-7756

Bd of Ed./Watervlt

(Filed Aug. 19, 1996)

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellant Board of Education/Watervliet.

> Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard

the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

By: /s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney

p o ccc
inbancdn frm

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

MANDATE

GEORGE LANGE III
CLERK

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 12th day of June, one thousand nine hundred and ninety-six.

PRESENT: HON. James L. Oakes
HON. Ralph K. Winter
HON. John M. Walker, Jr.
Circuit Judges

Docket No. 95-7756

COLLEEN RUSSMAN, a child with disabilities by her parents, PATRICIA and PAUL RUSSMAN,

Plaintiffs-Appellees,

V.

THOMAS SOBOL, as Commissioner of the New York State Education Department,

Defendant,

BOARD OF EDUCATION OF THE
ENLARGED CITY SCHOOL
DISTRICT OF THE CITY
OF WATERVLIET, NEW YORK,

Defendant-Appellant.

(Filed June 12, 1996)

Appeal from United States District Court for the Northern District of New York.

This cause came on to be heard on the transcript of record from the Northern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby **ORDERED, ADJUDGED, and DECREED** that the judgment of said district court be and it hereby is affirmed in accordance with the opinion of this court.

A TRUE COPY
GEORGE LANGE III,
CLERK

/s/ George Lange III

For the Court
GEORGE LANGE III, Clerk
By:
/s/ Beth J. Meador
Beth J. Meador
Administrative
Attorney

ISSUED AS MANDATE

SEP 13 1996